STATE OF MICHIGAN

IN THE SUPREME COURT

WAYNE COUNTY RETIREMENT COMMISSION and **WAYNE COUNTY EMPLOYEES' RETIREMENT SYSTEM,**

Plaintiffs/Appellees,

v

CHARTER COUNTY OF WAYNE and **WAYNE COUNTY BOARD OF COMMISSIONERS,**

Defendants/Appellants.

Supreme Court
No. 147296

COA No. 308096
L/C No. 10-013013AW
Hon. Michael F. Sapala

APPELLEES' SUPPLEMENTAL BRIEF

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STATEMENT OF QUESTIONS POSED BY THIS COURT

Whether the Court of Appeals erred in holding that provisions of Wayne County Enrolled Ordinance 2010-514 violate the Public Employee Retirement System Investment Act, MCL 38.1132 et seq ("PERSIA")?

The Court of Appeals says no.

The Retirement System says no.

Whether the ordinance violates Const 1963, art 9, §24?

The Court of Appeals was inclined to say yes, but did not decide the issue.

The Retirement System says yes.

APPELLEES' SUPPLEMENTAL ARGUMENT

In the reply brief it filed in support of its application for leave to appeal, the County asserts that the Retirement System is guilty of never explaining how the adoption of an ordinance permitting the County to underpay its actuarially determined pension funding obligation by $32 million violated PERSIA's "exclusive benefit" rule (County Reply at 3). The Retirement System believes it was clear, but will restate the violation at the outset here:

- PERSIA does not permit the County, a party in interest, to receive *any* benefit from System trust assets that is not merely "incidental." The County concedes this is so.
- System assets—*all* System assets—are protected trust assets under PERSIA and must be used for the exclusive benefit of the System's beneficiaries. The County now concedes this is so.
- The 2010 Ordinance declared, in effect, that $32 million in dedicated trust funds—most of the System's Inflation Equity Fund reserve—would be applied toward payment of the County's constitutionally-mandated pension funding obligation. The County concedes this is so.
- This benefited the County in a direct, dollar-for-dollar fashion, because the County then paid the System $32 million less than it would have in the absence of the 2010 Ordinance. The County concedes this is so.
- This benefit was not merely incidental. The County does not concede that this is so, but it is.

This, in brief summary, is one way in which the 2010 Ordinance offends PERSIA. There are five PERSIA infractions discussed in the Court of Appeals' opinion, two of which are discussed at length in this brief. There is also a constitutional route to the same conclusion, not reached by the Court of Appeals to avoid unnecessarily addressing a constitutional question. The Michigan constitution was not argued extensively in the Retirement System's response to the application, although the System did argue on the basis of Const 1963, art 9, §24 (the "Pension Clause") in the trial court and the Court of Appeals. Because this Court has asked the parties to address the

constitutional issue in its order of November 27, 2013, the Retirement System takes up that issue first.

I. ALTHOUGH THE ISSUE NEED NOT BE REACHED, THIS COURT SHOULD DENY LEAVE TO APPEAL FOR THE ADDITIONAL REASON THAT THE 2010 ORDINANCE VIOLATES THE MICHIGAN CONSTITUTION'S PENSION CLAUSE

A. The standard of review is de novo

As the Court of Appeals explained, "rulings on motions for summary disposition, issues of statutory construction, matters concerning the interpretation and application of municipal ordinances, and questions of constitutional law" are all reviewed de novo. *Wayne Cty Employees Ret Sys v Wayne Cty*, 301 Mich App 1, 24-25 (2013) (slip copy attached to the Retirement System's response brief, **Tab A**, Opinion at 14), citing *Midland Cogeneration Venture Ltd P'shp v Naftaly*, 489 Mich 83, 89 (2011), *Spiek v Dep't of Transp*, 456 Mich 331, 338 (1998), and other cases. The County agrees that the standard of review is de novo (Application at 20-21), as did the Court of Appeals in earlier pension appeals. *E.g., Board of Trs of the Policemen & Firemen Ret Sys v City of Detroit*, 270 Mich App 74, 77, *lv den* 477 Mich 892 (2006) (*City of Detroit—2006*).

B. The Pension Clause protects pensions in two ways, via the nonimpairment clause and the annual funding clause

Mich Const, art 9, §24 has two clauses, the "nonimpairment" clause and the "annual funding" clause (referred to collectively here as the "Pension Clause"):

> The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.
>
> Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

The first paragraph requires that financial benefits not be impaired and the second paragraph requires that the cost of benefits be fully funded each year. In the Court of Appeals,

the Retirement System argued that the 2010 Ordinance violated both of these clauses. The System argued that the 2010 Ordinance violated:

1. the "nonimpairment" clause by diminishing and impairing the 13th check program and the Inflation Equity Fund reserve (the "IEF reserve") that funded the program (Ret Sys COA Brief of Appellants at 40-46).

2. the "annual funding" clause by enabling the County to withhold payment of a portion of its Annual Required Contribution (the "ARC"), an actuarially determined funding obligation, during the years in question (*id.* at 19-25), and

The Court of Appeals found it "unnecessary, for the most part, to analyze this case under Const 1963, art 9, §24" (**Tab A**, at 2; 301 Mich App at 5), in light of the fact that "multiple provisions of the ordinance violate PERSIA, most importantly an ordinance provision requiring an offset of certain inflation reserve assets against the County's annual contribution to the pension fund" (*id.* at 1). That is why the Retirement System focused on PERSIA in its response to the County's application. Although the Court did not conclude that individual 13th checks are an "accrued financial benefit" (an incorrect statement addressed in more detail later in this brief, *infra* at 10-17, it did conclude that the IEF reserve is "a vested reserve" belonging to the Retirement System's participants as a whole, and therefore outside the County's reach:

> However, once a particular dollar amount, if any, was arrived at under the IEF formula, including the discretionary components controlled by the Retirement Commission, the IEF ordinance had always *compelled or mandated* the allocation or crediting of said amount to the IEF. And the assets in the IEF were dedicated for use by retirees and survivor beneficiaries in the form of a 13th check as a hedge against inflation....The IEF, in and of itself, can be accurately characterized as a vested reserve belonging and in relationship to the Retirement System's participants as a whole, outside the reach of defendants, to be used to assist retirees and survivor beneficiaries in fighting the devaluing of the dollar by inflation. (**Tab A** at 19-20; 301 Mich App at 34-35; emphasis by the Court of Appeals)[1]

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[1] There are minor variations in the Court of Appeals opinion as published. In the latter, the sentence after the ellipsis reads "The IEF, in and of itself, can be accurately characterized as a reserve belonging to and vested in relationship to the Retirement System's participants as a whole..." 301 Mich App at 34-35.

From this passage, the Court of Appeals appended a footnote that addressed the constitutional implications of the IEF reserve's vested nature:

> 23. Indeed, from a broad perspective, taking into consideration not individual retirees or survivor beneficiaries but all of them together as a group, the 13th check program itself could arguably be viewed as an accrued financial benefit for purposes of the first clause contained in Const 1963, art 9, §24, which benefit was diminished and impaired by the transfer of $32 million out of the IEF (*id.* 20 n.23).

The Court of Appeals, however, followed the prudent practice of declining to rule unnecessarily on a constitutional question (*id.* 20 n23; 301 Mich App at 35 n23). *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234 (1993).

C. Relevant history of the Pension Clause

The Pension Clause did not exist before Michigan adopted its current constitution in 1963. The previous constitution—like the present one—barred legislative enactments that impaired the right of contract: "No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." Mich Const 1963, art 1, §10 (the "Contract Clause"); Mich Const 1908, art II, §9.[2] The Pension Clause, like the Contract Clause, uses a form of the

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[2] Contract rights are protected from legislative impairment by both the Michigan and United States constitutions. US Const art 1, §10. There is a three-prong analysis for evaluating contract impairment claims. *Energy Reserves Grp, Inc v Kansas Power & Light Co*, 459 US 400, 411-412 (1983): whether there is a substantial impairment of a contractual relationship; whether there is a significant, legitimate public purpose behind the regulation; and whether the impairment is reasonable and necessary to serve that purpose. For a very recent judicial application of Contract Clause analysis, in the context of the Flint Emergency Manager's attempt to impair the health care benefits of Flint retirees, *see Welch v Brown*, 2014 WL xxxxxx, Case No 13-1476 (CA 6 1/3/2014) (**Tab P**, slip opinion at 10-15).

This Court, in *Studier v Michigan Public School Employees Ret Bd*, 472 Mich 642, 659-667 (2005), analyzed health care benefits and the Contract Clause and concluded that the specific statute there under review (MCL 38.1391) did not itself create contractual rights, making it unnecessary to apply the last two prongs of the test. In *Welch*, a case still in its early stages, the Sixth Circuit noted that the original contracts and collective bargaining agreements were not in the record but that the existence of contractual rights was not contested during the preliminary injunction proceedings (**Tab P** at 11 n.1). It concentrated on the second and third prongs of the Contract Clause analysis.

word "impair," but is worded differently—it states that pension benefits are "a contractual obligation…which shall not be diminished or impaired…" *Id.* art 9, §24. As discussed in the next subsection, whether the contract rights protected by these two constitutional provisions may be impaired in federal bankruptcy proceedings is currently an issue of great significance to the City of Detroit, its residents, and its retirees, but it is *not* an issue presented in this case.

Even before the Pension Clause became part of Michigan's supreme law, certain pension rights were protected in Michigan. One example is the statutorily-created retirement system for Michigan judges—the Judges Retirement Act, then at MCL 38.801 *et seq* and now at MCL 38.2101 *et seq.*—that was at issue in *Campbell v Michigan Judges Ret Bd*, 378 Mich 169 (1966). Although it was 1966 when this case was decided by the Court, the plaintiff judges had all retired before 1960. Membership in the system was voluntary and required execution of a written agreement. When the plaintiff judges retired, the statute provided for an escalator clause that required pension payments equal to one-half the salary currently being paid to circuit judges. *Id.* 177-178. This operated to increase the pensions of already retired judges as salaries of currently sitting judges increased, and was in effect a COLA provision, much like the 13th checks at issue in this case.

After the judges had retired, the escalator clause was eliminated from the statute and the judges brought an original mandamus action against the retirement board to require it to calculate

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Health care benefits and the Contract Clause also were at issue in *AFT Michigan v State of Michigan*, 297 Mich App 597 (2012), and *AFT Michigan v State of Michigan*, 2014 WL 128086 (Mich App 2014) (**Tab Q**). In *AFT—2012* the Court of Appeals struck down 2010 legislation that mandated withholding of 3% of teachers' wages to be applied towards employer contributions to the Michigan Public School Employees Retirement System (MPSERS), affirming the Court of Claims in part because the law impaired the teacher's contractually set wages. 297 Mich App at 610-616. In *AFT—2014*, similar legislation that had been modified to have only prospective effect and that gave MPSERS participants a choice was upheld against a variety of challenges. 2014 WL 128086 (**Tab Q**).

their pension benefits under the law in effect when they retired and their pensions vested, *i.e.*, with the escalator clause. The version of the statute with the escalator clause specifically made that clause applicable to already retired judges. This Court agreed that the writ should issue (without reference to the then-new Pension Clause) as to the petitioning judges, all of whom retired before the escalator clause was eliminated, because their contract rights—as defined in the statute in effect when they retired—were to pensions calculated by reference to then-current salaries for circuit judges, and could not be impaired by later legislative action because of the Contract Clause. *Id.* 179-181.

The Pension Clause extends this analysis to all members of public pension systems, regardless of whether they also are subject to an express contract. Under the Pension Clause, all financial benefits are "contractual obligations," just as though plan participants had signed agreements with the trustees of their retirement systems, like the judges who joined the system established by the Judges Retirement Act.

Before adoption of the 1963 Constitution, public pensions did not generally establish contractual obligations and thus could be modified by statute or ordinance. *Brown v Highland Park*, 320 Mich 108, 114 (1948); *Kosa v Treasurer of State of Mich*, 408 Mich 356, 368-369 (1980). With the adoption of the 1963 Constitution, those obligations are at least as well protected as other such obligations are protected by the Contract Clause. Indeed, it is the opinion of Michigan's Attorney General that they are protected absolutely. **Tab O**, Attorney General Bill Schuette's Statement Regarding the Michigan Constitution and the Bankruptcy of the City of Detroit (August 19, 2013).

D. The Detroit bankruptcy case and other recent rulings

1. The Detroit Chapter 9 bankruptcy case

Before proceeding further with this analysis, the Retirement System wishes to make it clear that the recent interpretation of the Pension Clause by Bankruptcy Judge Steven W. Rhodes in *In re City of Detroit*, Case No. 13-53846 (Bankr ED MI 2013) (**Tab N**), while undeniably a jurisprudentially significant decision, has ***no impact*** on the present case. Judge Rhodes was addressing a different issue entirely.

In *City of Detroit* the issue is whether a federal bankruptcy court may impair or diminish public pension benefits in the course of a Chapter 9 proceeding, despite the protections that those benefits receive under the Pension Clause. Here, in contrast, the County acknowledges that it may ***not*** impair or diminish pension benefits. It only asserts that the 2010 Ordinance does not impair benefits and concedes that the Ordinance is invalid if it does. Judge Rhodes was deciding whether the City of Detroit met the criteria for eligibility to be a debtor in Chapter 9, in the face of challenges on several fronts, including particularly whether Chapter 9 is constitutional if it would permit the impairment of pension rights.

If Judge Rhodes is correct, then public pension rights may be impaired in a bankruptcy proceeding. If he is incorrect—many appeals asserting that he erred are now pending[3]—those rights may not be impaired. Either way, this is a federal-state issue. Unquestionably, a county in Michigan may not impair pension rights protected by the Pension Clause. Even if characterized

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[3] Judge Rhodes has permitted these appeals from the threshold question of eligibility (and his decision that he has authority to impair pension obligations) to go forward. Michigan's Attorney General filed a "Statement" in the Bankruptcy Court on August 19, 2013, that summarizes his views on these two questions. The Attorney General is of the opinion that the Pension Clause bars the diminution or impairment of pensions by *any* means. **Tab O**, Attorney General Bill Schuette's Statement Regarding the Michigan Constitution and the Bankruptcy of the City of Detroit (August 19, 2013).

as a mere unsecured contractual obligation, it remains an obligation the County is bound to honor. The County freely admits that it may not impair or diminish pension obligations.

As Judge Rhodes points out, before 1963, pension debt was not a contractual obligation but something more like an implied commitment (**Tab N** at 75-76). *See Kosa, supra*, 408 Mich at 369. The present language was added to provide fuller protection to participants in public pension plans. It ensured that the participants' accrued financial benefits would be contractual obligations that could not be diminished (**Tab N** at 77, citing this Court's opinion in *In re Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 311 (2011)). But impairing contractual obligations is a fundamental part of what bankruptcy courts do every day.

Judge Rhodes' eligibility opinion has several analytical steps, outlined usefully in a table of contents (**Tab N**). After a lengthy introduction and factual recitation, several more pages are required to demonstrate the bankruptcy court's authority to rule on the issues presented. Then come "facial" challenges to Chapter 9 of the Bankruptcy Code, one of which is the claim that Chapter 9 violates the Tenth Amendment (powers not delegated to the United States by the Constitution are reserved for the States, or the people). In shortest form, this is not so if the state must first consent to the voluntary bankruptcy filing of a municipality, as happened with Detroit's filing. Finally, Judge Rhodes turns to the "as applied" challenge that Chapter 9 violates the Tenth Amendment:

> Although variously cast, the primary thrust of these arguments is that if chapter 9 permits the State of Michigan to authorize a city to file a petition for chapter 9 relief without explicitly providing for the protection of accrued pension benefits, the Tenth Amendment is violated. (**Tab N** at 73)

The State of Michigan, of course, cannot itself alter local public pension debt. That is barred not only by the Pension Clause but also by the Contracts Clause of the U.S. Constitution

(Article I, Section 10). And, although the County readily concedes that *it* may not impair or diminish pension rights, the bankruptcy court may not be so constrained.

Judge Rhodes, rightly or wrongly—it does not matter in this case—decided that the use of language denoting contractual obligation in the 1963 constitution itself, as well as Michigan cases construing the Pension Clause (*Kosa* and an advisory opinion, *In re Constitutionality of 2011 PA 38*), and the availability of alternate but unused mechanisms to provide different and perhaps bankruptcy-proof protection for pension obligations, together meant that pension rights were subject to impairment in bankruptcy:

> Because under the Michigan Constitution, pension rights are contractual rights, they are subject to impairment in a federal bankruptcy proceeding. Moreover, when, as here, the state consents, that impairment does not violate the Tenth Amendment. Therefore, as applied in this case, chapter 9 is not unconstitutional. (**Tab N** at 80).

2. Other recent developments

In other recent developments of at least some interest, an arbitration panel and a MERC administrative law judge have expressed opinions regarding the County's IEF program and the City of Detroit's different inflation-fighting program. The ALJ opinions have not yet resulted in MERC awards. Exceptions were filed by the County in its case and the City matter has been stayed. A circuit court case previously cited by the County also has been stayed because of the City of Detroit's bankruptcy. None of these impact the decision in the case at bar, but some additional detail is provided in the footnote.[4]

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[4] *General Retirement System v City of Detroit*, Wayne Cir No. 13-002368-CZ, is the case referenced by the County in its application (Application at 6 n.6 and Ex 2). That case, like the Detroit Chapter 9 case, is factually very different. It concerns an inflation program created by pension system resolution, not by City ordinance, and, in contrast to the County in the case at bar, the City is not trying to use program assets to reduce its annual funding obligation. It is stayed by the City's bankruptcy and does not apply here.

E. The 2010 Ordinance violates the nonimpairment clause of the Pension Clause

1. The Retirement System is obligated by the IEF Ordinance and its fiduciary duties under PERSIA to use the IEF reserve only for distribution of 13th checks to retirees and beneficiaries eligible to receive them; it has no discretion to use the reserve in any other manner

The heart of the lower courts' error on this issue was misunderstanding the nature of the Retirement System's "discretion" with regard to IEF distributions. Discretion, of course, means different things in different contexts. It covers a broad spectrum, as the Court knows first-hand from its own frequent application of the "abuse of discretion" standard of review, but the circuit court decided this case as though the existence of *any* discretion, no matter how narrowly circumscribed, was fatal to the Retirement System's argument. The Court of Appeals comes closer to getting the issue right, but still appears to have misunderstood the limited relevance of the Retirement System's discretion and ultimately does not rule on the constitutional issue at all.

Wayne County v Michigan AFSCME Council 25, AFL-CIO, Michigan Employment Relations Commission Case No. C10 J-266, Administrative Hearing Docket 10-000060-MERC. ALJ Doyle O'Connor's decision and recommended order is dated October 10, 2013. This decision was made under the Public Employment Relations Act "PERA," MCL 423.201 *et seq.*, not PERSIA or the Pension Clause. It considers whether the 2010 Ordinance was an unfair labor practice and concludes that it was. Exceptions have been filed and there is no MERC award at this writing.

City of Detroit v AFSCME Council 25, Michigan Employment Relations Commission Case No. C12 E-092, Administrative Hearing Docket 12-000777-MERC. ALJ Doyle O'Connor's decision and recommended order is dated October 4, 2013. This too is a PERA-based, fact-intensive decision, finding an unfair labor practice by the City. Again, there is no MERC award at this writing.

County of Wayne v Police Officers Ass'n of Michigan, Michigan Employment Relations Commission No. D12 C-0189, a statutory "Act 312' arbitration (MCL 423.231) decided by a panel of three arbitrators on October 16, 2013, based on testimony and "last best offers" made by the County and a labor union. This opinion, which touches on "13th check" issues in its fact section, is infected with errors traceable to the County. The Retirement System was not a party and had no opportunity to correct the factual errors. This opinion was not decided under either PERSIA or the Pension Clause.

The trustees of the Retirement System have very broad discretion on a number of significant issues,[5] but only very narrow discretion with regard to the IEF and the 13th check. Their discretion is circumscribed by PERSIA, MCL 38.1133(3) (fiduciary duties), and the IEF Ordinance. Under the IEF Ordinance, they have only three possible decisions to make, one at the "input" end and two at the "output" end. None of these discretionary decisions prevent the IEF reserve from being an accrued financial benefit.

On the input side, the trustees annually set the investment earnings threshold, the point below which no earnings are added to the IEF reserve. **Tab B**, IEF Ordinance §141-32(b). Once there are earnings above the threshold, as the Court of Appeals noted, a portion of them—as determined by the actuaries, not the trustees--automatically are allocated to the reserve via an accounting entry. The Retirement System trustees have *no* discretion to remove assets from the IEF reserve for any purpose other than 13th check distributions. The discretion to set the earnings threshold is not at issue in this case.

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5 As trustee of all Retirement System assets under both PERSIA and the County's own Retirement Ordinance (**Tab S**, WCCO §141-35), the Retirement Commission exercises "discretionary authority with respect to the management" of those assets, under the usual standards for exercising fiduciary duties. The same is true with respect to the investment of those assets (*id.*, WCCO §141-35(i)). Indeed, plan participants who are still working cannot definitively calculate what their 12 regular pension checks will be until they actually retire because the Retirement Commission regularly makes a variety of discretionary decisions that impact the calculation. There are decisions to be made regarding the maximum annual earnings to be taken into account (*id.*, WCCO §141-42(e) and actuarial assumptions that impact the final benefit amount (*id.*, WCCO §141-42(f). It is a fallacy to link "discretion" to the question whether there is an "accrued financial benefit." All parties and the lower courts agree that the 12 monthly checks generated from a defined benefit pension are "accrued financial benefits," despite the fact that the trustees' discretionary decisions impact the amount of the benefit until the day a member retires.

On the output side, the trustees could, in the exercise of their fiduciary duties, (i) decide not to make a distribution in a particular year[6] and (ii) decide how much in total to distribute in a particular year.[7] *Id.* §141-32(c), (d). The second option—what aggregate amount to distribute each year—is not at issue in this case. Whatever the amount, it is a financial benefit.[8]

The Retirement Commission has *never* exercised the first output option—a distribution has been made *every* year since the County created the inflation equity program. Still, the trustees had that discretion and the County's argument about the relevance of that discretion influenced both lower courts. But the point made by the Court of Appeals, focusing on the discretion to forgo making a distribution in a particular year, is neutralized by its own correct observation that the IEF reserve could be used for *no* other purpose. **Tab A** at 19-20, 301 Mich App at 34-35. Even if no distribution was made in a particular year, the financial benefit was merely deferred, not denied, since the entire reserve is solely dedicated to 13th check distributions. In pension law, rights are vested even if "the actual realization of expected benefits

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6 This discretion is implicit in the word "may" used in the IEF Ordinance. **Tab B**, IEF Ordinance §141-32(c). The Retirement Commission does not deny that because it "*may*, not more frequently than once per year, distribute to retired members and survivor beneficiaries" a 13th check, then, in theory at least, the trustees have some discretion not to make the distribution. That discretion, however, is limited by PERSIA, which requires the trustees to act exclusively in the best interests of plan participants, retirees, and their beneficiaries (MCL 38.1133(c)), with all due care, skill, prudence and diligence (MCL 38.1133(a)). The County's own ordinance is to the same effect (**Tab S**, §141-35(h),(i)).

7 Under the IEF Ordinance, once the trustees decide what the total distribution should be in a year, the amount of individual 13th checks is determined by applying the "unit" calculation described in the Application Response at 6, which "shall take into account the period of retirement and period of credited service." **Tab B**, IEF Ordinance §141-32(d).

8 It is immaterial to the "financial benefit" question whether the amount of the 13th check is variable from year to year, because many financial benefits are variable—including COLA benefits—and nonetheless remain benefits that are financial. Under ERISA, a COLA benefit is undoubtedly an "accrued benefit," *Hickey v Chicago Truck Drivers, Helpers & Warehouse Workers Union*, 980 F2d 465, 468-470 (CA 7, 1992), which in the case of a defined benefit plan—just as in the present case—is defined to be "an annual benefit commencing at normal retirement age." 29 USC §1002(23).

might depend on the sufficiency of plan assets," *Nachman v Pension Benefit Guaranty Corp*, 446 US 359, 378, 100 S Ct 1723, 1734 (1980).

The Retirement System introduced extensive evidence in the circuit court that its trustees have a fiduciary duty to distribute a 13th check annually, based on the expectations created by the collective bargaining agreements, the 26-year history of annual payments, the System's annual and actuarial reports on the System's web site and the IEF Ordinance itself. The trustees have never failed in this duty. The discretion *not* to make a distribution in a particular year is a theoretical last-step safeguard to prevent the IEF reserve from being depleted irresponsibly. The trustees, however, always have acted prudently when setting the amount of each annual distribution to avoid any need to ever exercise the option of forgoing a distribution.

The lower courts apparently accepted the County's argument that the mere existence of this limited and statutorily constrained discretion on the part of the trust's fiduciaries meant, as a matter of law, that the 13th check was not an accrued financial benefit, unlike the other 12 monthly pension checks. This was error. The Retirement System was not aggrieved by the Court of Appeals' error on this point, because that Court satisfactorily resolved the case on PERSIA grounds. Because this Court has asked the parties to brief the Pension Clause issues, however, the Retirement System stresses that merely chanting "discretion" does not avoid the blatant Pension Clause violation.

2. The Pension Clause considers the accrued financial benefits of each "retirement system" as well as each "pension plan"

The County dismisses as "fundamentally erroneous" (Application Reply at 2) the Court of Appeals' statement that the IEF reserve, as a whole, is arguably an accrued financial benefit for purposes of the nonimpairment clause (**Tab N** at 20 n23). The nonimpairment clause, however, supports that reading: "The accrued financial benefits of each pension plan *and*

retirement system...shall be a contractual obligation thereof which shall not be diminished or impaired thereby" (Const 1963, art 9, §24; emphasis added). Under PERSIA, the Retirement System assets are held in trust. MCL 38.1133(6). Under the Wayne County Charter (**Tab R** , Art VI "Retirement," §§6.111-6.113) and Retirement Ordinance (**Tab S**, §141-35(h)), the Retirement Commission is the trustee of the System's assets. The trustees of the Retirement System were and are obligated to use the trust funds in the IEF reserve solely for 13th check distributions. This is an obligation the County could not diminish or impair, which is exactly what the 2010 Ordinance did.

3. The 13th check is an accrued financial benefit from the perspective of eligible retirees and their beneficiaries

In the circuit court, the County's argument that the 13th check was not an accrued financial benefit was based on *Studier v Michigan Public School Employees Ret Bd*, 472 Mich 642 (2005), which holds that health care benefits are not accrued benefits. But *Studier* supports the Retirement System, not the County. It interpreted the meaning of "accrued financial benefits" for purposes of the Pension Clause to consist of two elements: (1) monetary payments (2) that grow over time. *Id.* at 654, 655. The 13th check is a monetary payment to eligible individuals, the value of which grows over time—even after retirement—because it is based on both length of service and length of retirement.[9] Accordingly, and unlike the health care benefits in *Studier*, the 13th check is an accrued financial benefit under the Pension Clause.

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[9] The longer a plan participant worked and the longer he or she is retired, the more "units" are earned. Because "units" are multiplied by a "unit value" to calculate the amount of a 13th check, the value of the benefit grows over time as a participant's number of units increases (Response to Application at 6).The IEF Ordinance mandates that the formula "shall" take into account both credited service and the period of retirement, **Tab B**, §141-32(d). As noted by the Court of Appeals, this has been "part of the IEF ordinance from the beginning..." (**Tab A**, at 28, 301 Mich App at 49).

More recently, the Court considered whether the Legislature could tax previously nontaxable pension income in *In re Constitutionality of 2011 PA 38, supra*, 490 Mich 295. The Governor had requested an advisory opinion concerning a statute that reduced or eliminated the tax exemption for public pension income, depending on household resources and age. This Court considered four questions, two of which are relevant here, namely whether the new statute (1) impaired accrued financial benefits under the Pension Clause or (2) impaired a contract obligation under the state or federal Contract Clause. This required the Court to consider the meaning of the phrase "accrued financial benefit" in the Pension Clause.

As in *Studier*, the Court in *2011 PA 38* looked to the plain meaning of the words to determine that the phrase meant "benefits of the type that increase or grow over time." *Id.* at 314. In its advisory opinion, the Court stated that a tax exemption for pension benefits did not qualify as an "accrued financial benefit." This opinion may have been influenced to some extent by the "especially strong" presumption of constitutionality for taxing statutes, *id.* at 308, but in any case a tax exemption, like health care benefits, may or may not ever be used by a retiree. If used, the value to the retiree is entirely a function of variables (the health of the retiree in *Studier*; the age and wealth of the retiree in *2011 PA 38*) not directly related to the length of service and length of retirement. In contrast, a County employee eligible for retirement just before the adoption of the 2010 Ordinance would have known from his contract and the Retirement System's website that he was going to be eligible to receive a 13th check from the IEF reserve, which had $44 million held in trust for that purpose. He also knew that his check would be based on his period of credited service and the length of his retirement (**Tab S**, §141-32(d)).

An instructive decision from the Court of Appeals is *Tinsman v City of Southfield*, 1999 Mich App LEXIS 2112 (Mich App 1999) (**Tab L**). In that case, retired Southfield police

officers, each of whom had more than 25 years of service, brought suit under the Pension Clause after Southfield adopted a new formula for calculating the pension benefit that disfavored them as compared to the formula in use when they retired. The old formula had two tiers, giving pension credit for years of service beyond 25, while the new formula did not. The Court of Appeals, like this Court in *Shelby Township*, quoted from the record of the Constitutional Convention in 1961:

> Once the employee, by working pursuant to an understanding that this is the benefit structure presently provided, has worked in reliance thereon, he has the contractual right to those benefits which may not be diminished or impaired. (**Tab L** at *9, *quoting* 1 Official Record, Constitutional Convention 1961, p 774)

The Court of Appeals held that the change in the formula and applying it to all employees diminished or impaired the plaintiffs' accrued financial benefits in the pension plan (*id.* *4), citing *Seitz v Probate Judges Ret Sys*, 189 Mich App 445, 455-456 (1991), and *Campbell, supra*, 378 Mich at 181-182.[10]

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[10] In *Seitz*, plaintiffs were three retired probate judges who participated in both county and state pension plans, the state plan being for Michigan probate judges. In 1976, while the judges were still on the bench, the state pension statute covering probate judges was amended to provide a cap for the pensions of retired judges who also were entitled to receive a county pension benefit, namely no more in total for both pensions than 2/3 of final salary. This was less than the pension maximum, which also was increased in the same 1976 amendment, and less than two of the three plaintiffs would otherwise have received. (The third retired judge was not yet receiving a county benefit when the trial court ruled.) The payment of county pension benefits was unaffected by the amendment; once the maximum was reached, the retiree simply received one less state pension dollar for every county dollar that resulted in a total exceeding 2/3 of final salary. The trial court found the combined cap to be unconstitutional and granted summary disposition; the Court of Appeals reversed and remanded for further proceedings. The Court of Appeals held that the Legislature may increase benefits without violating the Pension Clause, even if in some cases some of the retiree's constituent benefits would have increased even more without the amendment. A remand was necessary, however, to determine whether any of the plaintiff judges would have received more under the law as it existed before the amendment. In that case, there would be an impairment that violated the Pension Clause. 189 Mich App at 452-456.

Each year the Retirement System publishes and makes available to all plan participants the "Wayne County Employees' Retirement System Annual Report," which in its "Plan Description Section" includes a plain language "Brief Summary of Benefit Provisions" highlighting the benefits available and obligations under each of the five defined benefit plans (for example, eligibility, how to determine the amount of a normal retirement benefit, a disability retirement benefit and death benefit, the amount of covered compensation members must contribute). The same plain language for each plan is contained in the System's Annual Actuarial Valuation Report in a "Summary of Benefit Provisions" section. Both reports are on the Retirement System's web site and the latter report was an exhibit to the affidavit of Judith Kermans of Gabriel Roeder, the System's actuaries (**Tab E** is Kermans' affidavit; the "Summary of Benefit Provisions" is **Tab F**).

Each of the defined benefit plan summaries includes a prominent caption reading "***Post-Retirement Cost-of-Living Adjustment***" in bold italics, beneath which is the statement "Eligible for distributions from Reserve for Inflation Equity" or, in the case of Hybrid Plans 5 and 6, "Eligible for distributions from Reserve for Inflation Equity, except for members hired after execution of certain CBAs, who will not be eligible for distributions upon retirement" (**Tab F**).

These benefit summaries clearly inform participants of their eligibility for retirement benefits, including the provision for a cost-of-living component to be added to the other retirement benefits of retirees. Because of this, there is the same reliance here as the Court of Appeals described in *Tinsman*. The result also should have been the same, and the lower courts erred in stating that the 13th check is not an accrued financial benefit.

F. The 2010 Ordinance violates the annual funding clause of the Pension Clause

Neither lower court addressed the County's violation of the annual funding clause of the Pension Clause, although the Retirement System raised the issue in both courts. Instead of paying $32 million of the actuarially-calculated ARC—the County's constitutionally-mandated pension funding obligation—the County simply passed an ordinance. The Retirement System raised the issue in the circuit court, but it was not addressed there. For its part, the Court of Appeals did not need to decide this issue because of its PERSIA ruling. The violation, however, is patent.

The County is contractually obligated to fund all financial benefits arising on account of service rendered during a year, as determined by the Retirement System's actuaries, *in that year*. The County's ARC for the 2010 fiscal year was about $36.3 million, but the County paid only about $10 million. The Retirement System was shortchanged more than $26 million. The ARC for the next fiscal year was about $48 million or about $23.6 million for the first six months of the fiscal year. Instead of paying that amount, the County paid only about $17 million in April 2012, claiming that they still had a $6 million credit because they only used $26 million of the $32 million "offset" they took from the IEF reserve the year before.

The County's sleight-of-hand, designed to obscure the simple fact of its nonpayment of $32 million to the Retirement System, was the 2010 Ordinance. After not making its usual quarterly payments towards its ARC (like a taxpayer's quarterly estimated payments to the IRS) and after a series of expensive early retirement packages and benefit changes made by the County that drove up its ARC year after year since 2003, the County found itself in need of a way to manufacture millions of dollars out of thin air. It accomplished this by telling the Retirement System, in substance, that it was "paying" the ARC by taking $32 million already

held by the System in trust for the benefit of member retirees and their survivors. The County, by fiat in the 2010 Ordinance, inaccurately treated this $32 million as "excess" funds being used for "bonus" checks and, therefore, somehow, as really the County's money rather than the System's. It was not the County's money. It was not surplus. The County could make *no* decisions with respect to this money. The Retirement System was shortchanged by the County and has $32 million *less* to invest and grow than it should have. The Retirement System is in the business of investing its assets for the benefit of plan participants and the County's underpayment has cost the System far more than $32 million because of the market's strong performance since 2010.

The 2010 Ordinance also lays bare the sham by promising to "explore" ways of "reimbursing" the $32 million to the System. This is exactly what the second paragraph of the Pension Clause was written to forbid:

> The paramount concern of the 1961 Constitutional Convention, as it debated the precise language of this section, was to ensure the proper maintenance and the actuarial integrity of the state pension system.

Shelby Twp Police & Fire Ret Bd v Shelby, 438 Mich 247, 253 (1991). This Court's footnote to this sentence could have been written for the County in this case:

> [This] section is an attempt to rectify, in part, policies which have permitted sizeable deficiencies to pile up in retirement systems in this state. Under this section, accruing liability in each fiscal year must be funded during that year, thus keeping any of these systems from getting farther behind than they are now. [2 Official Record, Constitutional Convention 1961, p 3402].

In *Shelby Township*, the township was paying the retirement board less than the annually "certified" amount determined by the board's actuary. Because of this shortfall, the board's actuaries determined that the pension fund was underfunded. This Court had to determine, among other matters, whether the Pension Clause mandates that the ARC must include current service costs as well as unfunded accrued liabilities. The Court held it does:

> Our assessment of Art. 9, §24 and our examination of the constitutional debates, reveals the framers' clear intent to create a contractual obligation to ensure the full payment of financial benefits in the pension and retirement system. Permitting the township to fund only pensions payable in that year to current retirees and beneficiaries would unjustly alleviate the township of its obligation to fully fund the pension system.
>
> We therefore find that the second paragraph of Art. 9, §24 expressly mandates townships and municipalities to fund all public employee pension systems to a level which includes unfunded accrued liabilities.[11] *Shelby Township*, 438 Mich at 255.

After a thorough analysis of the history and purpose of the Pension Clause, the Court held that the constitutional framers intended to bar the Legislature (or, of course, any local legislative body)[12] from diminishing or impairing accrued financial benefits. *Id.* at 254, citing *Advisory Opinion re Constitutionality of 1972 PA 258*, 389 Mich 659, 663 (1973). Any failure to pay the full ARC diminishes and impairs the accrued financial benefits of the members of the Retirement System. Shelby Township's practice of underfunding the pension system was coined a "borrowing scheme" by the Supreme Court. Plainly, the 2010 Ordinance also is a borrowing scheme, trying to plug a hole in the County's budget that has been many years in the making. The County now admits that it enacted the 2010 Ordinance to avoid layoffs and curtailment of County services (Application at 2), but nothing in the record suggests that the County explored other possible options before seizing the quick-and-easy route of "borrowing" from Peter to pay Peter (to paraphrase an old adage about how not to manage one's money).

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[11] "'Unfunded accrued liabilities' are the estimated amounts which will be needed according to actuarial projections to fulfill presently existing pension obligations..." *Shelby Township*, 438 Mich at 256 n.4, *citing Kosa*, 408 Mich at 364, n.11.

[12] The Constitution expressly gives home rule cities and counties the power to run their own affairs as a municipal corporation. Const 1963, art 7, §1 and §21. Home rule entities are authorized to ratify a charter, *id.* art 7, §2, §22, but their authority is limited:

> Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, *subject to the constitution and law*." Const 1963, art 7, §22 (emphasis added).

The 2010 Ordinance itself acknowledges that $32 million was "borrowed" from the IEF reserve as an alternative to issuing bonds:

> (f) Within 9 months of first annual distribution from this fund, the CFO shall explore and report to the Wayne County Commission whether it is advantageous to issue bonds as a strategy to fully fund the retirement system and ***reimburse*** the Inflation Equity fund of $32 million dollars. (**Tab D**, §141-32(f); emphasis added)

As a borrowing scheme (without collateral or interest), the 2010 Ordinance is like the statute struck down in *AFT—2012*, which required individuals to turn over a portion of their wages in return for a "promise" of benefits that could be canceled at any time. The Court of Appeals characterized this as a forced loan to the employer school districts, with no right to receive anything in return and no guarantee of repayment. 297 Mich App at 625. Moreover, in PERSIA terms, a "loan" without adequate security and a reasonable rate of interest is prohibited. MCL 38.1133(6)(b) (now (8)(b); *see* footnote 13, *infra*.

The County's application for leave to appeal, which should be denied on the basis of the clear PERSIA violations identified by the Court of Appeals and discussed further in the next section of this brief, could also be denied on the ground that the 2010 Ordinance offends the Pension Clause of the Michigan Constitution.

II. THIS COURT SHOULD DENY LEAVE TO APPEAL BECAUSE THE COURT OF APPEALS CORRECTLY HELD THAT THE 2010 ORDINANCE VIOLATES PERSIA'S EXCLUSIVE BENEFIT AND PROHIBITED TRANSACTION RULES

There is little need to supplement the arguments already made by the parties concerning PERSIA. There has been no change or clarification of the law in this area since May 2012, when the Court of Appeals released its published opinion (**Tab A**). And the reply brief submitted by the County after the Retirement System responded to its application does not advance the County's previous argument. There are, however, a few more points that should be made.

The Court of Appeals found that key provisions of the 2010 Ordinance violated PERSIA. Specifically, §141-32(b)(3) of the 2010 Ordinance (**Tab C**), the provision directing the use of $32 million in the IEF reserve to reduce the County's minimum funding obligation, "directly conflicts with and violates the exclusive benefit rule" and that "a municipal ordinance that is in direct conflict with a state statute is preempted by state law" (**Tab A** at 17; 301 Mich App at 30). The Court of Appeals also held that the 2010 Ordinance violated PERSIA's "prohibited transaction" rule, MCL 38.1133(6)(c),[13] which makes it unlawful for the Retirement Commission to "cause the system to engage in a transaction" if it involves, "either directly or indirectly," a "use by or for the benefit of the political subdivision sponsoring the system of any assets of the system for less than adequate consideration" (**Tab A** at 26, quoting PERSIA; 301 Mich App at 47).

The Court of Appeals further held that the 2010 Ordinance violated PERSIA's maximum amortization period rule, MCL 38.1140m (**Tab A** at 31-32; 301 Mich App at 56-57). The 2010

[13] MCL 38.1133(6) has been amended and is now MCL 38.1133(8). In its response to the County's application, the Retirement System used the current cite, but the Court of Appeals and the County continue to use the older citation, which was in effect at the relevant time **Tab A** at 16-17 n.18; 301 Mich App at 29 n.18). In this brief, the Retirement System conforms its usage to avoid confusion.

Ordinance purported to set a 35-year amortization cap, five years longer than permitted by PERSIA. The effect of a longer amortization period is to reduce the amount of the ARC the County must pay. The County has not asked this Court to review that decision, acknowledging the violation.

In two respects the 2010 Ordinance purported to shift decision-making to the County that was solely within the authority of the Retirement Commission under PERSIA. First, the authority to set amortization periods resides with the Retirement Commission, not the County. *Board of Trs of the Policemen & Firemen Ret Sys v City of Detroit*, 270 Mich App 74, 82-85 (2006), *lv den* 722 NW2d 222. Second, the authority to authorize a reduction in ARC during periods of surplus, §141-32(e), resides with the Retirement Commission, not the County. These provisions violated PERSIA's MCL 38.1140m (**Tab A** at 31-33; 301 Mich App at 56-58). The County conceded these issues in the Court of Appeals and do not raise them in the application for leave to appeal.

PERSIA is an expansion of the Pension Clause's two provisions, the nonimpairment clause and the annual funding clause. There are further tiers of law announcing the same fundamental principles, and the 2010 Ordinance violates all of them. The 2010 Ordinance, for example, was barred by the County's own Charter. The same sentence in the Charter that says the County Commission may amend the Retirement Ordinance—already in effect when the Charter was adopted—ends by saying, "but an amendment shall not impair the accrued rights or benefits of any employee, retired employee, or survivor beneficiary" (**Tab R**, art VI, §6.111). This provision is quoted in full by the Court of Appeals (**Tab A** at 5; 301 Mich App at 11). The construction used in the Charter—"accrued rights *or* benefits"—is arguably *broader* than the Pension Clause itself or PERSIA's rephrasing of the nonimpairment clause.

Similarly, the Charter has its own version of the annual funding clause (**Tab R**, art VI, §6.113). It mandates the County's "contributions shall be sufficient to (i) cover fully costs allocated to the current year by the actuarial funding method, and (ii) liquidate over a period of years[14] the unfunded costs allocated to prior years by the actuarial funding method." The County's failure to pay its actuarially determined ARC violated its own Charter as well as PERSIA.

The Retirement System will supplement its briefing on the "exclusive benefit" and "prohibited transaction" aspects of the Court of Appeals' PERSIA decision in separate sections.

A. The 2010 Ordinance violates the exclusive benefit rule because the benefit to the County is admitted and not incidental

The County's argument that the 2010 Ordinance does not violate PERSIA's exclusive benefit rule (Application at 21-27) boils down to this: There can be no violation if the Retirement System's assets are used "exclusively" for the System's retirees and their beneficiaries. To the contrary, "exclusive" here is an adjective modifying "benefit" and not "used." The County tries to divorce the adjective from its noun and attach it to a different word, "used." The question is not whether the Retirement System's assets are "used" exclusively for retirees and their beneficiaries; the question is whether the "benefit" of the assets is received "exclusively" by those retirees and beneficiaries. Phrased another way, the County focuses on the fact that the System's "assets" remain with the System and thus solely benefit retirees and their beneficiaries. Again, this is not the right question. The question is whether the "benefit" of the assets is received "exclusively" by those retirees and beneficiaries. Obviously, it was not in this case. The

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[14] The Charter references various periods of years, including an amortization period of 35 years for certain older unfunded amounts, but that reference predates and was superseded by the adoption of MCL 38.1140m. The County has conceded this by not seeking leave to appeal from the Court of Appeals' decision on this point. When the 2010 Ordinance was being drafted, the drafters apparently looked at the Charter without consulting PERSIA.

County benefited by not paying the System $32 million that it unquestionably owed, as it must admit and does admit.

The County's claim in its application that "the assets never left the Retirement System, and instead were used exclusively for the benefit of participants and their beneficiaries" (Application at 21) is only accurate for the first seven words. Yes, "the assets never left the Retirement System" but, no, the benefit was not "exclusive" to the System's retirees and beneficiaries. The County devised a way to directly benefit from the use it made of these assets as well. Indeed, the County derived the primary benefit, filling a $32 million gap in its budget and depriving the Retirement System of $32 million that should have been earning interest for the benefit of System members, retirees, and beneficiaries. The Court of Appeals recognized that even though the transferred assets

> were still to be used for the benefit of participants and their beneficiaries in the form of regular pension payments, the County also enjoyed an enormous cost savings benefit. Accordingly, it cannot be said that the assets of the system were held or used "for the *exclusive* benefit of the participants and their beneficiaries." (**Tab A** at 18, emphasis by the Court of Appeals; 301 Mich App at 32)

If the County had paid what it owed, the Retirement System would have $32 million more than it does—indeed, considerably more than that in light of the investment returns it has been achieving the last three years—to the benefit of all interested parties.

In its response to the County's application, the Retirement System pointed out that the County lacked any authority—either in the text of PERSIA or the cases interpreting it—to suggest that the Court of Appeals was misreading the phrase "exclusive benefit" (System Response Brief at 28). The same is true of the County's reply brief in support of its application. Apart from perfunctory citations to its favorite two cases (*Claypool* and *Hughes*), the County cites only the Retirement System's cases, in an attempt to distinguish them. The statutory

language of PERSIA itself is clear and unambiguous. It needs no interpretation, particularly since it has now been so well explained by the Court of Appeals in the case at bar. No case cited by the County suggests a meaning for the phrase "exclusive benefit" other than the plain meaning correctly applied by the Court of Appeals.

Legislative intent in using adjectives that are not technical, legal terms is discerned by giving them their plain and ordinary meanings. *Studier*, 472 Mich at 652-653 (discussing the ratifiers' intent in using the adjectives "accrued" and "financial" in the Pension Clause phrase "accrued financial benefits"); *In re 2011 PA 38*, 490 Mich at 309 (same); *City of Detroit—2006*, 270 Mich App at 79-82 (trustees and their actuaries determine the amount of ARC to be paid under PERSIA, MCL 38.1140m). "Exclusive benefit" means, simply, that the County may not derive *any* benefit from the assets in the IEF reserve. MCL 38.1133(6). The narrow ERISA exception for "incidental" benefits, discussed in the Retirement System's response to the application (at 35-36), is of no avail to the County.

The County, despite claiming that its motives are irrelevant, tells this Court frankly that the so-called "design change" effected by the 2010 Ordinance "helped to fill a budget gap that otherwise would have produced layoffs and reduced county services" (Application at 2). The benefit here—avoiding $32 million in constitutionally-mandated pension funding obligation—was admittedly the very purpose of enacting the 2010 Ordinance. If this were primarily a Contract Clause case, motive might bear on the third prong of the test—whether the County's impairment was "reasonable and necessary" to serve a public purpose. *Energy Reserves Grp, supra* at 4 n.2, 459 US at 411-412. But this is primarily a PERSIA case. The County's motive in benefiting itself as it did is irrelevant. As a matter of law, the 2010 Ordinance violates PERSIA and thus cannot stand. This Court should deny leave to appeal.

B. The 2010 Ordinance violates the prohibited transaction rule because it required the Trustees of the Retirement System to use trust assets to benefit the County, a party in interest

The County's reply on the prohibited transaction violation (County Reply at 6-9) does not advance its argument. Over a third of these three pages is spent quibbling about the Retirement System's case authority to no effect. Another third is spent discussing how there was no transfer of System assets "to" the County, which willfully misses the point. Neither the Court of Appeals nor the Retirement System ever claimed that $32 million was physically transferred "to" the County, as barred by PERSIA's "prohibited transaction" rule, MCL 38.1133(6)(c). But this section of PERSIA sets forth a much broader prohibition than that. The County devotes very little space to the real issue, which is whether the 2010 Ordinance required the trustees of the Retirement System to engage in a transaction that they knew would "directly or indirectly" be a "use by or for the benefit of, the political subdivision sponsoring the system." The Court of Appeals correctly found that the 2010 Ordinance violated PERSIA's "prohibited transaction" rule by directing the Retirement Commission to "cause the system to engage in a transaction" if it involves, "either directly or indirectly," a "use by or for the benefit of the political subdivision sponsoring the system of any assets of the system for less than adequate consideration" (**Tab A** at 26, quoting the statute; 301 Mich App at 47).

Citing MCL 38.1140m as support, the County continues to argue that what it euphemistically calls "credit and offset" transactions cannot be a prohibited transaction, because PERSIA permits it in a certain limited situation (*i.e.*, only when the Retirement System has a surplus and the System's trustees decide it is appropriate).[15] The rationale, apparently, is that if

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[15] Under PERSIA, only the trustees of a retirement system, on the advice of their actuaries, may calculate and impose the annual required contribution (**Tab J**, *Retired Detroit Police & Fire Fighters Ass'n v Detroit Police Officers Ass'n* (Mich App 2010)). Even then, only "surplus" assets may be credited. "In a plan year, any current service cost payment may be

something is allowed based on any one particular set of conditions, it must never be prohibited (*see* County Reply Brief at 9). This, of course, is flawed logic. Just because an action does not violate a statute under one set of circumstances does not mean that it can never violate the statute. A homicide may or may not be murder. The Court of Appeals here was considering the specific facts before it—all of which are undisputed—and on those facts, correctly found a violation.

The 2010 Ordinance directed the trustees of the Retirement System to debit $32 million from its IEF reserve and credit its defined benefit assets and then accept as payment in full of the County's ARC a sum that was $32 million short of the County's required contribution, made mandatory by the constitution's Pension Clause, PERSIA, the Wayne County Charter, and the Wayne County Retirement Ordinance. The 2010 Ordinance thus benefited the County by making it appear that the County had successfully balanced its budget via a "design change" (the County's phrase), a transaction that left the System with $32 million less than it was owed and the County with $32 million more than it was entitled to. The Retirement System received no consideration for this transaction, which achieved a result that PERSIA does not permit either directly or indirectly. The 2010 Ordinance provision about considering the feasibility of repaying the $32 million, without interest, has proven to be worth exactly nothing.

Recognizing that PERSIA prohibited the trustees from acquiescing in this transaction, MCL 38.1133(6)(c), the Retirement System brought this action for declaratory and other relief. In the interim, the trustees complied with the 2010 Ordinance, which has gutted the IEF reserve.

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offset by a credit for amortization of accrued assets, if any, *in excess of* actuarial accrued liability" MCL 38.1140m (emphasis added). Finally, the discretion to extend such a credit resides solely with the Retirement System's trustees. **Tab J**, *Retired Detroit Police & Fire Fighters Ass'n v Detroit Police Officers Ass'n*, 2010 Mich App LEXIS 2414, 2010 WL 5129841 (Mich App 2010), *lv den* 489 Mich 934 (2011).

(Since 2010, the Retirement System's trustees have managed to continue the 13th check program, albeit with much smaller annual distributions than have been made historically.) The County's pretense that nothing has really happened here ignores the reality that it withheld payment of $32 million owed to the Retirement System, which now has $32 million less with which to pay benefits, earn interest and provide adequate inflation relief to the System's retirees and their beneficiaries. There was an effective "transfer" of assets to the County here, but even if there were not, PERSIA's prohibition is broader than that. It bars a transfer "or" a use by "or" a use for the benefit of the County, all in the disjunctive. MCL 38.1138(6). Moreover, PERSIA prohibits both direct *and* indirect actions taken to accomplish such uses.

The Court of Appeals chose its words carefully when it called this a "sham transaction involving, *effectively*, an unlawful transfer of assets to the County for use to satisfy obligations relative to the ARC" (**Tab A** at 27; 301 Mich App at 48; emphasis by the Court). The County asserts that it enacted the 2010 Ordinance to avoid employee layoffs and the curtailment of services, but does not argue that its fiscal woes excused the violations of PERSIA found by the Court of Appeals. They do not. Nothing in the record suggests that the County explored any other possible alternatives before choosing to violate PERSIA. This Court should deny leave to appeal.

CONCLUSION AND RELIEF REQUESTED

For all these reasons, and for the additional reasons in the Court of Appeals' opinion (**Tab A**), and in the Retirement System's main response to the County's application for leave to appeal, the Retirement System respectfully requests that this Court deny leave to appeal.

In the alternative, the Retirement System requests that this Court remand this case to the Court of Appeals for consideration and decision of the Pension Clause issue, which that Court has not yet decided and should decide in the first instance.

Respectfully Submitted,

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Dated: January 22, 2014

STATE OF MICHIGAN

IN THE SUPREME COURT

WAYNE COUNTY RETIREMENT COMMISSION and **WAYNE COUNTY EMPLOYEES' RETIREMENT SYSTEM,**

Plaintiffs/Appellees,

v

CHARTER COUNTY OF WAYNE and **WAYNE COUNTY BOARD OF COMMISSIONERS,**

Defendants/Appellants.

Supreme Court
No. 147296

COA No. 308096
L/C No. 10-013013AW
Hon. Michael F. Sapala

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is employed by the firm of Jaffe, Raitt, Heuer & Weiss, PC, and that on January 22, 2014 she caused a copy of **Appellees' Supplemental Brief** to be served upon counsel of record at the address listed below via First Class Mail:

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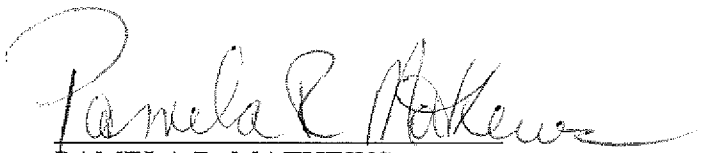

PAMELA R. MATHEWS

N

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:
City of Detroit, Michigan,
Debtor.
_____/

Chapter 9
Case No. 13-53846
Hon. Steven W. Rhodes

Opinion Regarding Eligibility

The Congress shall have Power To . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States. . . .

Article I, Section 8, United States Constitution

No . . . law impairing the obligation of contract shall be enacted.

Article I, Section 10, Michigan Constitution

The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.

Article IX, Section 24, Michigan Constitution

Table of Contents

I. Summary of Opinion

For the reason stated herein, the Court finds that the City of Detroit has established that it meets the requirements of 11 U.S.C. § 109(c). Accordingly, the Court finds that the City may be a debtor under chapter 9 of the bankruptcy code. The Court will enter an order for relief under chapter 9.

Specifically, the Court finds that:

- The City of Detroit is a "municipality" as defined in 11 U.S.C. § 101(40).
- The City was specifically authorized to be a debtor under chapter 9 by a governmental officer empowered by State law to authorize the City to be a debtor under chapter 9.
- The City is "insolvent" as defined in 11 U.S.C. § 101(32)(C).
- The City desires to effect a plan to adjust its debts.
- The City did not negotiate in good faith with creditors but was not required to because such negotiation was impracticable.

The Court further finds that the City filed the petition in good faith and that therefore the petition is not subject to dismissal under 11 U.S.C. § 921(c).

The Court concludes that it has jurisdiction over this matter under 28 U.S.C. § 1334(a), and that the matter is a core proceeding under 28 U.S.C. § 157(b)(2).

II. Introduction to the Eligibility Objections

The matter is before the Court on the parties' objections to the eligibility of the City of Detroit to be a debtor in this chapter 9 case under 11 U.S.C. § 109(c).

A. The Process

By order dated August 2, 2013, the Court set a deadline of August 19, 2013 for parties to file objections to eligibility. (Dkt. #280) That order also allowed the Official Committee of Retirees, then in formation, to file eligibility objections 14 days after it retained counsel.

O'Connor may have been saying nothing more than that one cannot consent to have a gun held to one's head. The idea of "consent" in such a scenario is meaningless.

If this understanding is correct, it would be incumbent upon the objecting parties to identify some way in which federal authority has compelled state action here. They have not.

Whatever the intended meaning of this language, it cannot be that state consent can never "cure" what would otherwise violate the Tenth Amendment. That meaning would sweep aside the holding of *New York* itself. Nor does this language undo the holding in *Bekins,* which, as stated before, this Court must apply until the Supreme Court overrules it.

Accordingly, the Court concludes that chapter 9 is not facially unconstitutional under the Tenth Amendment.

5. Chapter 9 Is Constitutional As Applied in This Case.

Several of the objecting parties also raise "as-applied" challenges to the constitutionality of chapter 9 under the Tenth Amendment to United States Constitution. Although variously cast, the primary thrust of these arguments is that if chapter 9 permits the State of Michigan to authorize a city to file a petition for chapter 9 relief without explicitly providing for the protection of accrued pension benefits, the Tenth Amendment is violated.

The Court concludes that these arguments must be rejected.

a. When the State Consents to a Chapter 9 Bankruptcy, the Tenth Amendment Does Not Prohibit the Impairment of Contract Rights That Are Otherwise Protected by the State Constitution.

The basis for this result begins with the recognition that the State of Michigan cannot legally provide for the adjustment of the pension debts of the City of Detroit. This is a direct result of the prohibition against the State of Michigan impairing contracts in both the United

States Constitution and Michigan Constitution, as well as the prohibition against impairing the contractual obligations relating to accrued pension benefits in the Michigan Constitution.

The federal bankruptcy court, however, is not so constrained. As noted in Part VIII B, above, "The Bankruptcy Clause necessarily authorizes Congress to make laws that would impair contracts. It long has been understood that bankruptcy law entails impairment of contracts." *Stockton*, 478 B.R. at 15 (citing *Sturges v. Crowninshield*, 17 U.S. 122, 191 (1819)).

The state constitutional provisions prohibiting the impairment of contracts and pensions impose no constraint on the bankruptcy process. The Bankruptcy Clause of the United States Constitution, and the bankruptcy code enacted pursuant thereto, explicitly empower the bankruptcy court to impair contracts and to impair contractual rights relating to accrued vested pension benefits. Impairing contracts is what the bankruptcy process does.

The constitutional foundation for municipal bankruptcy was well-articulated in *Stockton*:

> In other words, while a state cannot make a law impairing the obligation of contract, Congress can do so. The goal of the Bankruptcy Code is adjusting the debtor-creditor relationship. Every discharge impairs contracts. While bankruptcy law endeavors to provide a system of orderly, predictable rules for treatment of parties whose contracts are impaired, that does not change the starring role of contract impairment in bankruptcy.
>
> It follows, then, that contracts may be impaired in this chapter 9 case without offending the Constitution. The Bankruptcy Clause gives Congress express power to legislate uniform laws of bankruptcy that result in impairment of contract; and Congress is not subject to the restriction that the Contracts Clause places on states. Compare U.S. Const. art. I, § 8, cl. 4, with § 10, cl. 1.

478 B.R. at 16.

For Tenth Amendment and state sovereignty purposes, nothing distinguishes pension debt in a municipal bankruptcy case from any other debt. If the Tenth Amendment prohibits the impairment of pension benefits in this case, then it would also prohibit the adjustment any other debt in this case. *Bekins* makes it clear, however, that with state consent, the adjustment of

municipal debts does not impermissibly intrude on state sovereignty. *Bekins*, 304 U.S. at 52. This Court is bound to follow that holding.

b. Under the Michigan Constitution, Pension Rights Are Contractual Rights.

The Plans seek escape from this result by asserting that under the Michigan Constitution, pension debt has greater protection than ordinary contract debt. The argument is premised on the slim reed that in the Michigan Constitution, pension rights may not be "impaired or diminished," whereas only laws "impairing" contract rights are prohibited.

There are several reasons why the slight difference between the language that protects contracts (no "impairment") and the language that protects pensions (no "impairment" or "diminishment") does not demonstrate that pensions were given any extraordinary protection.

Before reviewing those reasons, however, a brief review of the history of the legal status of pension benefits in Michigan is necessary.

At common law, before the adoption of the Michigan Constitution in 1963, public pensions in Michigan were viewed as gratuitous allowances that could be revoked at will, because a retiree lacked any vested right in their continuation. In *Brown v. Highland Park*, 320 Mich. 108, 114, 30 N.W.2d 798, 800 (Mich. 1948), the Michigan Supreme Court stated:

> We are convinced that the majority of cases in other jurisdictions establishes the rule that a pension granted by public authorities is not a contractual obligation, that the pensioner has no vested right, and that a pension is terminable at the will of a municipality, at least while acting within reasonable limits. At best plaintiffs in this case have an expectancy based upon continuance of existing charter provisions.

Similarly, in *Kosa v. Treasurer of State of Mich.*, 408 Mich. 356, 368-69, 292 N.W.2d 452, 459 (1980), the court observed this about the status of pension benefits before the 1963 Constitution was adopted:

> Until the adoption of Const. 1963, art. 9, s 24, legislative appropriation for retirement fund reserves was considered to be an ex gratia action. Consequently, the most that could be said about "pre-con" legislative appropriations for retirees was that there was some kind of implied commitment to fund pension reserves.

Id. (footnote omitted).

In the 1963 Constitution, this provision enhancing the protection for pensions was included: "The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby." Mich. Const. art. IX, § 24.

In *Kosa*, 408 Mich. at 370 n.21, 292 N.W.2d at 459, the Michigan Supreme Court quoted the following history from the constitutional convention regarding article 9, section 24:

> "MR. VAN DUSEN: Mr. Chairman, if I may elaborate briefly on Mr. Brake's answer to Mr. Downs' question, I would like to indicate that the words 'accrued financial benefits' were used designedly, so that the *contractual right of the employee* would be limited to the deferred compensation embodied in any pension plan, and that we hope to avoid thereby a proliferation of litigation by individual participants in retirement systems talking about the general benefits structure, or something other than his specific right to receive benefits. It is not intended that an individual employee should, as a result of this language, be given the right to sue the employing unit to require the actuarial funding of past service benefits, or anything of that nature. *What it is designed to do is to say that when his benefits come due, he's got a contractual right to receive them.* "And, in answer to your second question, *he has the contractual right to sue for them.* So that he has no particular interest in the funding of somebody else's benefits as long as *he has the contractual right to sue for his.*
>
> "MR. DOWNS: I appreciate Mr. Van Dusen's comments. Again, I want to see if I understand this. Then he would not have a remedy of legally forcing the legislative body each year to set aside the appropriate amount, but when the money did come due this would be a *contractual right* for which he could sue a ministerial officer that could be mandamused or enjoined; is that correct?
>
> "MR. VAN DUSEN: Thats my understanding, Mr. Downs."

1 Official Record, Constitutional Convention 1961, pp. 773-774.

Id. (emphasis added).

Kosa also offered an explanation for the origin of the provision. "To gain protection of their pension rights, Michigan teachers effectively lobbied for a constitutional amendment granting *contractual status* to retirement benefits." 408 Mich. at 360, 292 N.W.2d at 455 (emphasis added).

The *Kosa* court summarized the provision, again using contract language, as follows:

> To sum up, while the Legislature's constitutional *contractual obligation* is not to impair "accrued financial benefits", even if that obligation also related to the funding system, there would be no impairment of the *contractual obligation* because the substituted "entry age normal" system supports the benefit structure as strongly as the replaced "attained age" system.

Id., 408 Mich. at 373, 292 N.W.2d at 461(emphasis added).

> While counting such blessings as have come to them, public school employees are understandably still concerned about their pension security. In that regard, this opinion reminds the Legislature that the constitutional provision adopted by the people of this state is indeed a *solemn contractual obligation* between public employees and the Legislature guaranteeing that pension benefit payments cannot be constitutionally impaired.

Id., 408 Mich. at 382, 292 N.W.2d at 465 (emphasis added).

More recently, in *In re Constitutionality of 2011 PA 38*, 490 Mich. 295, 806 N.W.2d 683 (2011), the Michigan Supreme Court unequivocally stated, "The obvious intent of § 24, however, was to ensure that public pensions be treated as *contractual obligations* that, once earned, could not be diminished." *Id.* at 311, 806 NW.2d at 693 (emphasis added).

That historical review begins to demonstrate the several reasons why the slight difference in the language that protects contracts and the language that protects pensions does not suggest that pensions were given any extraordinary protection:

First, the language of article IX, section 24, gives pension benefits the status of a "contractual obligation." The natural meaning of the words "contractual obligation" is certainly inconsistent with the greater protection for which the Plans now argue.

Second, if the Michigan Constitution were meant to give the kind of absolute protection for which the Plans argue, the language in the article IX, section 24 simply would not have referred to pension benefits as a "contractual obligation." It also would not have been constructed by simply copying the verb from the contracts clause - "impair" - and then adding a lesser verb -"diminish" in the disjunctive.

Third, linguistically, there is no functional difference in meaning between "impair" and "impair or diminish." There certainly is a preference, if not a mandate, to give meaning to every word in written law. In *Koontz v. Ameritech Servs., Inc.*, 466 Mich. 304, 312, 645 N.W.2d 34, 39 (2002), the Michigan Supreme Court summarized the familiar command, "Courts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory." The court went on to state, however, "we give undefined statutory terms their plain and ordinary meanings." *Id.*

Under *Meridian Mut. Ins. Co. v. Kellman*, 197 F.3d 1178, 1181 (6th Cir. 1999), discussed in more detail in Part IX A, below, this Court is bound by these commands of statutory interpretation that the Michigan Supreme Court embraced in *Koontz*. But if this Court gives these terms - "diminish" and "impair" - their plain and ordinary meanings, as *Koontz* requires, those meanings would not be substantively different from each other. The terms are not

synonyms, but they cannot honestly be given meanings so different as to compel the result that the Plans now seek. "Diminish" adds nothing material to "impair." All "diminishment" is "impairment." And, "impair" includes "diminish."

Fourth, the Plans' argument for a greater protection is inconsistent with the Michigan Supreme Court's interpretation of the constitutional language in *Kosa* and in *In re Constitutionality of 2011 PA 38*. Those cases also used contract language to describe the status of pensions. This is important because the Sixth Circuit has held that on questions of state law, this Court is bound to apply the holdings of the Michigan Supreme Court. *See Kirk v. Hanes Corp. of North Carolina*, 16 F.3d 705, 706 (6th Cir. 1994).

Fifth, an even greater narrative must be considered here, focusing on 1963. *Bekins* had long since determined that municipal bankruptcy was constitutional. That of course meant that even though states could not impair municipal contracts, federal courts could do that in a bankruptcy case. Indeed, Michigan law then allowed municipalities to file bankruptcy.[24]

It was within that framework of rights, expectations, scenarios and possibilities that the newly negotiated, proposed and ratified Michigan Constitution of 1963 explicitly gave accrued pension benefits the status of contractual obligations. That new constitution could have given pensions protection from impairment in bankruptcy in several ways. It could have simply prohibited Michigan municipalities from filing bankruptcy. It could have somehow created a

[24] See Public Act 72 of 1939, MCL § 141.201(1) (repealed by P.A. 70 of 1982) ("Any . . . instrumentality in this state as defined in [the Bankruptcy Act of 1898 and amendments thereto] . . . may proceed under the terms and conditions of such acts to secure a composition of its debts. . . . The governing authority of any such . . . instrumentality, or the officer, board or body having authority to levy taxes to meet the obligations to be affected by the plan of composition may file the petition and agree upon any plan of composition authorized by said act of congress[.]").

property interest that bankruptcy would be required to respect under *Butner v. United States*, 440 U.S. 48, 99 S. Ct. 914 (1979) (holding that property issues in bankruptcy are determined according to state law). Or, it could have established some sort of a secured interest in the municipality's property. It could even have explicitly required the State to guaranty pension benefits. But it did none of those.

Instead, both the history from the constitutional convention, quoted above, and the language of the pension provision itself, make it clear that the only remedy for impairment of pensions is a claim for breach of contract.

Because under the Michigan Constitution, pension rights are contractual rights, they are subject to impairment in a federal bankruptcy proceeding. Moreover, when, as here, the state consents, that impairment does not violate the Tenth Amendment. Therefore, as applied in this case, chapter 9 is not unconstitutional.

Nevertheless, the Court is compelled to comment. No one should interpret this holding that pension rights are subject to impairment in this bankruptcy case to mean that the Court will necessarily confirm any plan of adjustment that impairs pensions. The Court emphasizes that it will not lightly or casually exercise the power under federal bankruptcy law to impair pensions. Before the Court confirms any plan that the City submits, the Court must find that the plan fully meets the requirements of 11 U.S.C. § 943(b) and the other applicable provisions of the bankruptcy code. Together, these provisions of law demand this Court's judicious legal and equitable consideration of the interests of the City and all of its creditors, as well as the laws of the State of Michigan.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	Chapter 9
CITY OF DETROIT, MICHIGAN. Debtor.	No. 13-53846
	HON. STEVEN W. RHODES

/

ATTORNEY GENERAL BILL SCHUETTE'S STATEMENT REGARDING THE MICHIGAN CONSTITUTION AND THE BANKRUPTCY OF THE CITY OF DETROIT

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CONCISE STATEMENT OF ISSUE PRESENTED

1. Whether the City of Detroit was eligible to file Chapter 9 bankruptcy under 11 U.S.C. § 109(c).

STATEMENT OF INTEREST OF ATTORNEY GENERAL

The Attorney General is the chief legal officer for the State of Michigan and is empowered by State law to intervene and appear in any legal action in which the People of Michigan "in his own judgment" have an interest. Mich. Comp. Laws § 14.28. His office is created by the Michigan Constitution, and he is elected by the people. Mich. Const. art. V, § 21. He is sworn to uphold the Michigan Constitution. Mich. Const. art. XI, § 1.

Consistent with this responsibility and authority, Attorney General Bill Schuette participates in this case to ensure that all necessary actions are taken to fully protect (a) the City's pensioners (as required by the Michigan Constitution and other applicable law), (b) the art collection of the Detroit Institute of Arts, and (c) all other interests of the People of Michigan.

The City of Detroit is Michigan's largest city and municipal employer. It is imperative that this bankruptcy yield a new, revitalized City, but this process must occur in such a way as to ensure the City abides by its constitutional limitations. The State's most fundamental law—its Constitution—cannot be sacrificed during the process.

INTRODUCTION

Michigan Attorney General Bill Schuette does not take issue with the City of Detroit's eligibility to file a Chapter 9 bankruptcy under 11 U.S.C. § 109(c)(2). Michigan Governor Rick Snyder had the authority to and did properly authorize the City's filing, and there is no serious question that the City is insolvent. Accordingly, this Court is the proper venue to decide the issues related to the City's financial crisis.

But a bankruptcy filing does not relieve the City and its emergency manager of their obligation to follow Michigan's Constitution. And that restriction includes the constitutional provision that prohibits a political subdivision like Detroit from diminishing or impairing an accrued financial benefit of a pension plan or retirement system. Mich. Const. art. IX, § 24.

Unlike other chapters of the Bankruptcy Code, Chapter 9 authorizes only one party to propose a plan in a municipal bankruptcy—the debtor. *Compare* 11 U.S.C. § 941 (Chapter 9 debtor "shall file a plan") *with* 11 U.S.C. § 1121(a), (c) ("any party in interest" "may" file a plan). And when the City proposes its plan, it must act within all of the state-law limits that guide the City's conduct. 11 U.S.C. § 943(b)(4).

For example, under Michigan law, the City and its emergency manager have no authority to propose a plan that supports a particular religion or violates an individual's right to religious liberty. Mich. Const. art. I, § 4. Nor could they propose a plan that limits citizens from petitioning the City for redress. Mich. Const. art. I, § 3. Similarly, the City cannot propose a plan that diminishes or impairs accrued pension rights of public employees. Mich. Const. art. IX, § 24.

It has been suggested that the constitutional protection of public pensioners is akin to Michigan's Contracts Clause, which prohibits any law "impairing the obligation of contract." Mich. Const. art. I, § 10. Not so. State and United States Supreme Court decisions have oft recognized that the Contracts Clause prohibition is not absolute and must be "accommodated to the inherent police power of the State 'to safeguard the vital interest of its people.'" *Romein v. General Motors Corp.*, 462 N.W.2d 555, 565 (Mich. 1990) (quoting *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 410 (1983)). Insolvency is undoubtedly an exigency that authorizes such an accommodation; thus, there is no conflict between the bankruptcy laws and the Contracts Clause of the U.S. or any state constitution.

But under Michigan law, there is no such accommodation when it comes to the accrued financial benefits of a public pension plan or retirement system. The constitutional protection is absolute. So the City can no more authorize a plan that reduces accrued obligations to public pensions than a plan that discriminates on the basis of religion. Accordingly, while the City has the ability to address health benefits or *unaccrued* pension benefits (neither of which Michigan's Constitution specifically protects), *vested* pension benefits are inviolate.

This result is as it should be. According to the Detroit General Retirement System, general City workers like librarians or sanitation workers receive an average payment of roughly $18,000 per year. For retired City police and firefighters, the figure is roughly $30,000 per year, and without the benefit of Social Security payments. These retirees are among Michigan's most vulnerable citizens. The People of Michigan recognized as much and sought to protect them when enacting article IX, § 24. Accordingly, the City of Detroit is constitutionally obligated to keep the People's promise as it proposes a plan that will allow the City to flourish while honoring the lifelong commitment of Detroit's retired public servants.

ARGUMENT

I. The City of Detroit is eligible to proceed under Chapter 9, but the City remains subject to Michigan's Constitution.

Under Public Act 436 of 2012, the City's emergency manager acts as its receiver, and stands in the place of its governing body and chief executive officer. Mich. Comp. Laws § 141.1549(2). The manager also represents the City in bankruptcy. Mich. Comp. Laws § 141.1558(1). He is a public officer subject to the laws applicable to public servants and officers. Mich. Comp. Laws § 141.1549(3)(d) and (9)(a), (b), and (c). And the emergency manager has taken an oath to uphold the Michigan Constitution. Mich. Comp. Laws § 15.151; Mich. Const. art. XI, § 1.

As a public officer, and like any citizen of the State, the emergency manager must follow the Michigan Constitution and statutes enacted by the Legislature pursuant to its constitutional authority. This inter-play of Michigan's Constitution and Public Act 436 requires that the emergency manager abide by all applicable laws in governing the City.

The same obligation to comply with the Michigan Constitution applies to the emergency manager during this Chapter 9 proceeding. "Indeed, absent a specific provision to the contrary, a municipality is required to continue to comply with state law during a Chapter 9 case."

6 Collier on Bankruptcy ¶ 903.02 (Alan N. Resnick and Henry J. Sommer eds. 16th ed.) This is significant, because under Chapter 9, the City, through the emergency manager, is the only party with authority to propose a plan of adjustment, 11 U.S.C. § 941, and therefore controls the plan process in a way that is unique to bankruptcy law.

The scope of a state's authorization of a municipal-bankruptcy filing is a "question of pure state law" and thus "state law provides the rule of decision." *In re City of Stockton*, 475 B.R. 720, 728–29 (Bankr. E.D. Cal. 2012). The Michigan Legislature cannot enact laws that authorize local governments to violate the Michigan Constitution, and the Legislature's enactment of Public Act 436—specifically the bankruptcy authorization in § 18(1), Mich. Comp. Laws § 141.1558(1)—must thus be construed according to this basic legal principle. This means that when the Legislature enacted Public Act 436 and empowered the City and its emergency manager to pursue bankruptcy, the City and the manager's actions in proposing a reorganization plan remain subject to applicable Michigan law, including article IX, § 24 of Michigan's Constitution.

Article IX, § 24 unambiguously prevents public officials from diminishing vested public-employee pension rights:

> The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which *shall not be diminished or impaired* thereby.

Mich. Const. art. IX, § 24 (emphasis added). This provision prohibits the State, its officers, and any of its political units, including the City and its officers, from diminishing or impairing the pension benefits currently being received by retired City pensioners.

The fact that § 18(1), Mich. Comp. Laws § 141.1558(1), does not incorporate article IX, § 24 is of no moment, because the proscription arises by operation of constitutional law. Moreover, it is plain that the Michigan Legislature was aware of this constitutional provision when it enacted Public Act 436 because the Act requires emergency managers appointed under the act to "fully comply with . . . section 24 of article IX of the state constitution of 1963," in the event an emergency manager becomes the trustee for a local unit's pension fund. Mich. Comp. Laws § 141.1552(1)(m)(ii).

The continued application of state constitutional law during the Chapter 9 case is also consistent with state sovereignty principles, which are incorporated under 11 U.S.C. § 903 (Chapter 9 "does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality . . . ."). See also *New York v. United States*, 505 U.S. 144, 155–66 (1992) (recognizing dual sovereignty and observing that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions"); 5 William J. Norton, Jr. & William L. Norton III, Norton Bankruptcy Law and Practice § 90:4 (3d ed. 2009) ("Without the consent of the municipality, the court may not interfere with any of the political or governmental powers of the debtor, any property or revenues of the debtor, or the debtor's use or enjoyment of any income-producing property.").

Based on these principles, as the City and its emergency manager progress under Chapter 9 and ultimately propose a plan for the City's reorganization, they remain subject to applicable state laws, including the Michigan Constitution and article IX, § 24.

II. Michigan's Constitution bars the diminution or impairment of pensions by any means.

A. The Michigan Constitution established that pensioners have a contractual right to their pensions.

At common law, public pensions in Michigan were viewed as gratuitous allowances that could be revoked at will because a retiree lacked any vested right in their continuation. *See, e.g., Brown v. Highland Park,* 30 N.W.2d 798 (Mich. 1948); *Attorney General v. Connolly*, 160 N.W. 581 (Mich. 1916). That view is captured succinctly in the Michigan Supreme Court's holding in *Brown*:

> [A] public pension granted by public authorities is *not* a contractual obligation, that the pensioner has *no* vested right, and that a pension is *terminable at the will* of a municipality, at least while acting within reasonable limits.

Brown, 30 N.W.2d at 800 (emphasis added).

The People of Michigan reversed this public policy when they adopted art. IX, § 24 in the 1963 Michigan Constitution. The purpose for adopting this provision was made clear by delegates to the 1963 Constitutional Convention. In particular, delegate Richard VanDusen, one of the chief drafters of § 24, explained that accrued financial benefits were a kind of "deferred compensation":

> Now, it is the belief of the committee that the benefits of the pension plans are in the same deferred compensation for work performed. And with respect to work performed, it is the opinion of the committee that the public employee should have a contractual right to benefits of the pension plan, which should not be diminished by the employing unit after the service has been performed.

1 Official Record of the State of Michigan Constitutional Convention of 1961, 770–71 [hereinafter *Constitutional Convention Record*].

Michigan courts have supported this conclusion and have recognized, repeatedly, that article IX, § 24 is an express and unambiguous statement of the will of the People of the State of Michigan that the accrued financial benefits of each pension plan and retirement system of the State and its political subdivisions "shall not be diminished or impaired." This constitutional promise thus ensures that there is never a time, a place, or a method for diminishing or impairing the State's *or a political subdivision's* obligation with respect to the accrued financial benefits of a pension plan or retirement system.

For example, based on § 24, the Michigan Court of Appeals has held that the City of Detroit's attempt to increase the age at which an employee could receive his vested pension (and thereby *decrease* the amount of pension payments) violated art. IV, § 24. *Ass'n of Prof'l &*

Technical Employees v. City of Detroit, 398 N.W.2d 436 (Mich. Ct. App. 1986). The Court of Appeals has also held that § 24 prohibits the State or a local pension plan from reducing a retiree's pension. *Seitz v. Probate Judges Ret. Sys.*, 474 N.W.2d 125 (Mich. Ct. App. 1991).

Similarly, § 24 prohibits the City of Detroit and its emergency manager from unilaterally reducing the pensions of existing retirees, because any reduction would diminish or impair the accrued financial benefits previously earned by such retirees. Just as the City and its manager have no authority to propose a plan that supports a particular religion or violates an individual's right to religious liberty (or, for that matter, a plan that seizes the assets of retired employees in violation of the Michigan Constitution's Takings Clause, *see* Mich. Const. art. X, § 2), the City and the emergency manager cannot propose a plan that has the effect of diminishing or impairing the accrued rights of public-employee pensions.[1]

[1] Article 11, §11-101, ¶ 3 of the City of Detroit's Home Rule City Charter equally treats and protects the accrued financial benefits of active and retired city employees as contractual obligations that "shall in no event be diminished or impaired."

The entire thrust of article IX, § 24 is to safeguard a level of benefits for governmental employees who make a decision to retire. The public employees performed the work relying on a "particular level of benefits." 1 *Constitutional Convention Record* at 770–71 ("the service in reliance upon the then prescribed level of benefits"). The *post hoc* reduction of these vested rights would create an untenable position for the retirants by reducing their compensation after the benefits have already vested. *See In re Advisory Opinion re Constitutionality of 1972 PA 258,* 209 N.W.2d 200, 202–03 (Mich. 1973) (rejecting any new conditions on accrued financial benefits that were "unreasonable and hence subversive of the constitutional protection"). It is analogous to forcing the pensioners to return deferred compensation. It is this very kind of reduction of pension payments that the constitutional provision is designed to prevent.

In sum, it cannot be reasonably disputed that the City has been authorized for and is eligible to file Chapter 9 bankruptcy. But in moving forward and proposing a plan, the City and its manager are bound by the strictures of Michigan law, including article IX, § 24 of Michigan's Constitution.

B. Michigan's constitutional protection of pensions is broader than that afforded to ordinary contracts.

At the core of a bankruptcy process is the adjustment of the relationship between a debtor and its creditors, and attendant in that process is the impairment of contracts. *In re Stockton*, 478 B.R. at 15. The State of Michigan's Contracts Clause, Mich. Const. art. I, § 10, mirrors that of the United States Constitution and the contracts clauses of other states, and it is well understood that such a provision must stand aside in the bankruptcy process. But the subversion of a state constitution's contracts clause does not come about as a result of bankruptcy law or the Supremacy Clause of the United States Constitution; a contracts clause steps aside as a matter of state law.

Both the Michigan Supreme Court and the United States Supreme Court have recognized that a constitutional contracts clause is not absolute. The prohibition against impairing contracts must be "accommodated to the inherent police power of the State 'to safeguard the vital interests of the people.'" *Romein*, 462 N.W.2d at 565 (quoting *Energy Reserves Group*, 459 U.S. at 410). Thus, state action can impair a contract provided that there is a legitimate public purpose for the impairment (i.e., the state is validly exercising its police power and not

merely providing a benefit to special interests), and the means of adjustment are necessary and reasonable. *Romein*, 462 N.W.2d at 565–66 (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22-23 (1977)). Accordingly, a Michigan political subdivision is cloaked with the authority of Michigan law when it proposes a plan that impairs ordinary contracts. Here, for example, it cannot be disputed that the police power of the State and the City of Detroit is being exercised for a necessary and reasonable public purpose—to restore basic governmental services (police and fire protection, street lights, ambulance services, etc.) to the citizens of Detroit.

But article IX, § 24 is not similarly subject to such exigencies.[2] The 1963 Constitution and the language of § 24 is understood according to its plain meaning. *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 806 N.W. 2d 683, 693 (Mich. 2011); *Studier v. Michigan Pub. Sch. Employees' Retirement Bd.*, 698 N.W.2d 350, 356–57 (Mich. 2005).

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[2] Article IX, § 24 makes the City of Detroit's bankruptcy quite different than the one at issue in *In re Stockton*, because the California Constitution contains no specific protection for pensions, only a generic Contracts Clause. Cal. Const. art. I, § 9.

In other words, article IX, § 24 is an impermeable imperative, and its place in the pantheon of Michigan constitutional rights is akin to the prohibition on taking property without just compensation, Mich. Const. art. X, § 2, or any other constitutional prohibition on the power of a government to affect the life, liberty, and property of its citizenry. Constitutional provisions of this nature are innate to the People of Michigan—not subject to discharge by exigency including a Chapter 9 proceeding under the federal Bankruptcy Code. The City and its emergency manager therefore cannot jettison article IX, § 24 when they propose a reorganization plan.[3]

Importantly, article IX, § 24 is not an absolute bar on the City's ability to adjust its debts in a Chapter 9 proceeding. The City may negotiate to adjust contractual terms under pension plans and retirement systems. *Cranford v. Wayne County*, 402 N.W.2d 64, 66 (Mich. 1986); *see also Stone v. State*, 651 N.W.2d 64 (Mich. 2002). Similarly, the City is not prevented from taking even unilateral action

[3] The same is true for similar reasons with respect to the City's role as trustee of the art collection of the Detroit Institute of Arts. Because the collection is held in charitable trust, the beneficial interest in the collection ultimately rests with the People of Michigan and is likewise inviolate. See AG Op. No. 7272, June 13, 2013.

with respect to *unaccrued* financial benefits. *Advisory Opinion re Constitutionality of 1972 PA 258*, 209 N.W.2d at 202–03 (1973) ("the legislature cannot diminish or impair accrued financial benefits, but we think it may properly attach new conditions for earning financial benefits which have not accrued."); *see also Seitz*, 474 N.W.2d at 127. And § 24 does not implicate the City's obligation with respect to promised health benefits. *Studier,* 698 N.W.2d at 358 ("the ratifiers of our Constitution would have commonly understood 'financial' to include only those benefits that consist of monetary payments, and not benefits of a nonmonetary nature such as health care benefits").

These are all constitutionally acceptable ways for the City of Detroit to reduce its liabilities for its pension plans without violating the constitutional rights of existing retirees. But to the extent the City or its manager desire to diminish or impair *vested* pension benefits, Michigan law prohibits them from even proposing such a plan.

C. The Bankruptcy Code recognizes the State's constitutional limits on municipalities in Chapter 9 bankruptcy.

Independent of the City's obligation to act within state-law limits when proposing a plan, article IX, § 24 applies to a Chapter 9 bankruptcy by virtue of 11 U.S.C. § 903. Section 903 guarantees that state law continues to bind a political subdivision's actions once in bankruptcy:

> This chapter [9] does not limit or impair the power of a State to control, *by legislation or otherwise*, a municipality of or in such State in the exercise of the political or governmental powers of such municipality . . . .

11 U.S.C. § 903. In § 903, Congress protected the "States as States" as dual sovereigns under the federal Constitution. State participation in the national political process is the "fundamental limitation that the [United States] constitutional scheme imposes on" the powers granted to the federal government. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985). Section 903 is a result of the states' place in the constitutional framework and participation in federal government and enacted legislation. *Id.* at 552. By including § 903 in the Bankruptcy Code, Congress preserved state constitutional protection provisions, like § 24, within the Code's structure and purpose.

Indeed, nowhere in the Bankruptcy Code provisions applicable to Chapter 9 did Congress expressly provide for the treatment of municipalities' pension plans or retirement systems. Chapter 9's applicable provisions, structure, and purpose do not disclose any Congressional intent to preempt state constitutional protection provisions like § 24.[4]

Moreover, through Chapter 9 Congress has recognized that the bankruptcy of a State's political subdivision is a particular concern of a state and its relations with its political subdivisions. This conclusion is embedded in the preservation of the states of complete control over their political subdivision in the exercise of the political or governmental powers of such subdivisions, 11 U.S.C. § 903.

Consistent with § 903, the Bankruptcy Code imposes strict limitations on the power of this Court to direct municipal action regarding its political process, property, or revenue "unless the debtor consents." 11 U.S.C. § 904. Just as the City lacks the authority under

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[4] The pension obligations in question are not executory contracts subject to rejection under 11 U.S.C. § 365. This further distinguishes them from the collective bargaining agreement treatment set forth in *Vallejo*. *In re City of Vallejo*, 432 B.R. 262 (E.D. Cal. 2010); *In re City of Vallejo*, 403 B.R. 72 (Bankr. E.D. Cal. 2009).

Michigan law to propose a plan that diminishes accrued pension rights, it similarly lacks power to consent to any proposed action that would violate the Michigan Constitution.

CONCLUSION AND RELIEF REQUESTED

This matter is only at the eligibility stage, and, as noted above, the Attorney General does not take issue with the City's eligibility to file bankruptcy. Michigan Governor Rick Snyder had the authority to and did properly authorize the City's filing, and there is no serious question that the City is insolvent.

But through this submission, the Attorney General seeks to illuminate the legal rights and obligations of the City and its emergency manager as they move forward and exercise their exclusive Chapter 9 authority to propose a plan of reorganization. Those obligations include the requirement to act in accord with State law, including article IX, § 24's prohibition on a Michigan political subdivision's authority to diminish or impair accrued pension rights. In this initial filing, the Attorney General also seeks to apprise the Court of his legal positions, and he will offer additional arguments and support for his positions at the appropriate stages of this important proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on August 19, 2013, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
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No. 13-1476

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN WELCH; KENNETH SPARKS, JR.; JUDITH WELCH; CAROL SPARKS; SHERRY MURPHY; MARK A. FULKS; URGE,	)	
Plaintiffs-Appellees,	)	
v.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
MICHAEL BROWN; EDWARD KURTZ; ROBERT ERLENBECK; GERALD AMBROSE; CITY OF FLINT,	)	
Defendants-Appellants.	)	**OPINION**

BEFORE: DAUGHTREY, COLE, and WHITE, Circuit Judges.

COLE, Circuit Judge. The limited purpose of this appeal is to determine whether the district court abused its discretion by granting Plaintiffs-Appellees preliminary injunctive relief. The City of Flint is in financial distress. Declining property taxes, high unemployment rates, and a decrease in revenue-sharing from the State of Michigan have contributed to the City's chronic budgetary woes. To stave off municipal insolvency and balance the City's budget, the Governor of Michigan appointed an Emergency Manager to address the financial crisis. In this appeal, Plaintiffs challenge several orders the Emergency Manager issued, which modified existing contracts and collective bargaining agreements with respect to health-care benefits of municipal retirees. While the

modifications stand to save the City 3.5 million dollars, the changes also shift out-of-pocket medical expenses to retirees, many of whom live on fixed incomes.

Plaintiffs and the class they represent are individual retired municipal workers, their eligible spouses, dependents, and the United Retired Governmental Employees ("URGE"), an organization that represents the interests of municipal retirees. Seeking injunctive relief and damages under 42 U.S.C. § 1983, Plaintiffs filed a Class Action Complaint against the City of Flint, its current and former Emergency Managers, its Retirement Officer Manager, and its Finance Director (collectively, "Defendants"). According to Plaintiffs, Defendants violated the Contract and Bankruptcy Clauses of the United States Constitution and deprived them of a property interest without due process or just compensation. Plaintiffs requested a preliminary injunction to enjoin Defendants from modifying the contracts and ordinances governing their health-care benefits and to restore any already modified agreements to the status quo ante. Although Defendants argue that reducing retiree benefits is a "necessary change" to avoid bankruptcy, the district court was not persuaded based on the evidence and argument presented. Finding no abuse of discretion, we affirm the district court's order granting preliminary injunctive relief.

I. BACKGROUND

In 2011, the Michigan legislature passed the Local Government and School District Fiscal Accountability Act ("Public Act 4") to ensure the financial accountability of local governments and to provide services for the health, safety, and welfare of citizens. Under Public Act 4, the Governor appointed Michael Brown as Flint's Emergency Manager—with the attendant authority to modify collective bargaining agreements and contracts in order to "rectify the financial emergency." Public

Act 4 was subsequently repealed by referendum, and Edward Kurtz became the new Emergency Manager. Kurtz later appointed Brown as the City Administrator of Flint. Although the Act was repealed, Defendants seek to enforce the actions taken by Brown when he acted as the Emergency Manager under Public Act 4.

There is little doubt that Flint faces a serious financial emergency and is, in effect, under state receivership. In 2011, the City had a cumulative deficit of $25.7 million. Michigan law, however, requires that local governments operate under a balanced budget. As a result, local officials are faced with the formidable task of reducing the City's accumulated deficit.

For fiscal year 2013, Brown proposed that Flint balance its budget in a single year. To accomplish this, Gerald Ambrose, Flint's Financial Director, provided deposition testimony that reducing the deficit would require the City to reduce its work force by 115 positions, implement a twenty percent salary reduction for other employees, and modify the City's pension and health-care plans. In addition to reducing expenditures, the City also adopted methods to increase revenues. For example, Flint raised the water and sewer rates, yielding approximately 15 million dollars; increased fees for garbage collection, netting approximately 1.5 million dollars; and imposed a street-light assessment, resulting in additional revenues of 2.85 million dollars. Despite these changes, the City has continued to experience a cash shortage.

Recognizing that more needed to be done, in 2012 Brown issued a series of orders modifying certain terms in collective bargaining agreements between Flint and Plaintiffs-retirees. Plaintiffs claim they are entitled to lifetime health-care benefits identical or comparable to the plans in effect at the time of their retirement. These benefits are secured by collective bargaining agreements, other

contracts, ordinances, and past practices. The orders reshape Plaintiffs' contractual expectations in several ways. First, the City will no longer provide health-care coverage for a retiree's spouse if the spouse is eligible to receive paid coverage through a current or former employer. Second, the modifications limit all active and retired employees to three insurance providers, as opposed to the twenty different health insurance plans available before the changes. Defendants believe this consolidation will save the City $7,874,152 annually, although it also shifts costs to Plaintiffs by increasing deductibles, co-payments, and coinsurance. Under all three plans, Plaintiffs will be forced to pay a minimum of $500 and a maximum of $2,000 in out-of-pocket expenses before any insurance coverage begins. Retirees will also have to cover twenty percent of the costs of their health-care, out-of-pocket, even after the deductibles have been paid. Finally, the changes mandate that retirees and their eligible spouses aged sixty-five and over enroll in, and pay for, Medicare Supplemental Part B. This modification requires Plaintiffs to pay an additional $100 per person, per month.

Plaintiffs claim they are unable to pay for Medicare and health-care premiums because they live on fixed incomes. If Defendants are not preliminarily enjoined, Plaintiffs fear they will have to sacrifice basic necessities as a result of the increased co-pays and deductibles. For Plaintiff Judith Welch, the modifications require her and her spouse to purchase Medicare Part B at an additional cost of $200 per month. Welch also claims that as a result of the modifications, she will no longer be able to visit the physician who has been treating her for the past thirty years.

With over 1,000 municipal retirees, Defendants argue that if health-care benefits are not modified, the City would have to find another way to reduce expenditures immediately by 3.5 million dollars because there are no alternative revenue sources.

Defendants caution that curtailing public safety personnel would be imprudent and ultimately detrimental to the City's residents. Numerous accounts have underscored the violence in Flint. The City was recently ranked as "the number one most violent city in the nation," it was rated number six on a list of "America's most violent cities for women," and it was ranked number one on the FBI's 2011 List of Most Violent Cities with Populations over 100,000 persons. At this point, reductions have not been made to the Public Safety budget. But if the City maintains its current level of retiree health-care coverage, Defendants predict that it would be "impossible" to sustain police and fire services because public safety consumes about 70 percent of the City's general fund budget.

II. PROCEDURAL HISTORY

On August 29, 2012, Plaintiffs moved for a temporary restraining order and a preliminary injunction to preclude modifications of their health-care plans from taking effect. In lieu of an evidentiary hearing, the parties submitted depositions and other documentary evidence. Based on this paper record, on March 29, 2013, the district court granted Plaintiffs' motion for a preliminary injunction.

Defendants then moved to stay the injunction pending appeal, and the district court denied their motion. After Defendants requested a stay on July 2, 2013, a panel of this court stayed the

preliminary injunction pending the outcome of the instant appeal. Defendants thereupon appealed the district court's order enjoining the Emergency Manager's modifications from taking effect. We have jurisdiction to review the district court's decision under 28 U.S.C. § 1292(a)(1).

III. ANALYSIS

A. Standard of Review

A "district court's findings of fact underlying its decision to grant a preliminary injunction are reviewed for clear error and the legal conclusions underpinning its decision are reviewed de novo." *In re Eagle-Picher Indus., Inc.*, 963 F.2d 855, 858 (6th Cir. 1992). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). The district court's ultimate decision to grant a preliminary injunction is accorded significant deference and examined under the "highly deferential" abuse of discretion standard. *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). Accordingly, a decision may be disturbed only if the district court "relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). Only in the "rarest of cases" should a district court's evaluation of the equities be disrupted on appeal. *NAACP v. City of Mansfield*, 866 F.2d 162, 166 (6th Cir. 1989).

B. Preliminary Injunction Standard

A preliminary injunction is an extraordinary remedy that should be granted only if the movant establishes that the circumstances clearly demand it. *Leary*, 228 F.3d at 739. To determine whether an injunction is appropriate, a trial court must consider "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *Tumblebus Inc. v. Cranmer*, 399 F.3d 754, 760 (6th Cir. 2005). These considerations are "factors to be balanced, not prerequisites that must be met." *Washington v. Reno*, 35 F.3d 1093, 1099 (6th Cir. 1994).

C. The Emergency Manager's Orders are an Exercise of Legislative Power

Plaintiffs claim that Defendants violated the Contract Clause of the U.S. Constitution because the modifications impair provisions of their contracts and collective bargaining agreements. The district court did not abuse its discretion in finding that this argument has a likelihood of success on the merits.

The Contract Clause provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl.1. In interpreting this clause, the Supreme Court has recognized the "high value" the Framers placed on protecting private contracts. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978). Case law also makes clear that this "prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428 (1934). Although citizens have the right to order their affairs by contract, states must be allowed to carry out "essential attributes

of sovereign power" to safeguard their citizens. *Linton by Arnold v. Comm'r of Health & Env't*, 65 F.3d 508, 517 (6th Cir. 1995) (internal quotation marks omitted). Before addressing the merits of Plaintiffs' Contract Clause claim, we must, as a threshold matter, examine whether the Emergency Manager's orders constitute an exercise of legislative authority. If not, the Contract Clause is not implicated.

A cause of action under the Contract Clause must be based on legislative acts because "the prohibition [against the impairment of contracts] is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals." *Ross v. Oregon*, 227 U.S. 150, 162 (1913). In *Ross*, the Supreme Court explained that the Contract Clause reaches "every form in which the legislative power is exerted, whether it be a constitution, a constitutional amendment, an enactment of the legislature, a by-law or ordinance of a municipal corporation, or a regulation *or order of some other instrumentality* of the state exercising delegated legislative authority." *Id.* at 163 (emphasis added). "Whether actions are, in law and fact, an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'" *INS v. Chadha*, 462 U.S. 919, 952 (1983) (discussing Congressional action) (citation omitted). With this content-based inquiry in mind, this court has specified that municipal resolutions can be considered legislative acts. *See Wojcik v. City of Romulus*, 257 F.3d 600, 612 (6th Cir. 2001).

Defendants reject the district court's characterization of the Emergency Manager's orders as legislative acts, arguing that Brown merely applied a law enacted by the Michigan Legislature. To support this argument, Defendants rely on *City of Pontiac Retired Emps. v. Schimmel*, in which

the district court held that an Emergency Manager's actions were not "legislative action" because he failed to enact any laws. No. 12-12830, 2012 WL 2917311, at *5 (E.D. Mich. July 17, 2012). However, this decision has since been reversed and remanded by the Sixth Circuit, albeit on different grounds. *City of Pontiac Retired Emp. Ass'n v. Schimmel*, 726 F.3d 767 (6th Cir. 2013) (Griffin, J., dissenting). Importantly, because we did not confront directly whether an Emergency Manager's actions are an exercise of legislative power, it is questionable what weight, if any, to place on the district court's decision in *City of Pontiac*.

In our view, the terms of Public Act 4 make clear that the orders are an exercise of legislative power. Under the Act, the Emergency Manager had the facially unlimited authority to

> reject, modify, or terminate 1 or more terms and conditions of an existing collective bargaining agreement. The rejection, modification or termination of 1 or more terms and conditions of an existing collective bargaining agreement under this subdivision is a *legitimate exercise of the state's sovereign powers* if the emergency manager and the state treasurer determine that [certain] conditions are satisfied . . . .

Mich. Comp. Laws § 141.1519(1)(k) (emphasis added). The Act gave the Emergency Manager the ability to adopt or amend ordinances and exercise any power "relating to the operation of the local government." M.C.L. § 141.1519(1)(dd)-(ee). The Act also provided the Emergency Manager with expansive authority to act "in place of local officials, specifically the Mayor and City Council." The Emergency Manager, just like the City Council, had legislative powers to pass ordinances and appropriate funds, it is therefore reasonable to construe the Emergency Manager's actions as "legislative" because he had been delegated identical responsibilities under the Act.

The district court explained that Brown did not merely enforce already-existing laws. To the contrary, the authority to repeal and enact new municipal ordinances, according to the court,

sufficiently establishes an exercise of legislative power. We conclude that the character and effect of the challenged orders are properly understood as legislative because Public Act 4 explicitly contemplates that the Emergency Manager's orders will carry the force of the state's sovereign powers.

D. Likelihood of Success on the Merits

With this foundational question addressed, we now consider whether Plaintiffs are likely to succeed on the merits of their Contract Clause claim. To establish a strong likelihood of success on the merits, the moving party is not "required to prove his case in full . . . ." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007) (quoting *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). Instead, "it is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 402 (6th Cir. 1997).

The Supreme Court's framework for evaluating contract impairment claims involves a three-prong analysis. *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411–12 (1983). Courts must determine (1) whether a plaintiff has established "a substantial impairment" of a contractual relationship, (2) whether the state has a "significant and legitimate public purpose behind the regulation" such as the "remedying of a broad and general social or economic problem,"

and (3) whether the impairment is reasonable and necessary to serve that purpose. *Id*; *United States Trust Co. of NY v. New Jersey*, 431 U.S. 1, 25 (1977). We examine each consideration in turn.

1. Substantial Impairment

For a substantial impairment to exist, there must be a contractual relationship and a change in law that substantially impairs that relationship.[1] *Wojcik*, 257 F.3d at 612. The record before the district court indicates that the modifications will impose a "severe strain" on Plaintiffs by requiring them to pay significant amounts for Medicare and health-care premiums. In making its factual determinations, the court relied on affidavits and depositions describing how the changes impact Plaintiffs' access to medical care.

To begin, most of the Plaintiffs live on fixed incomes, and the proposed changes are material given the increases in co-pays and deductibles the retirees must pay. Plaintiff John Welch and his wife have approximately $440 remaining at the end of each month after paying their expenses. Because his pension and Social Security benefits are fixed, Welch doubts that he will be able to afford the new costs associated with his medical treatment. He explained, "[I]t's going to cost $1,000 for me and $1,000 for my wife for the copay. Plus, out of our Social Security, it's going to cost me a hundred dollars and her a hundred dollars . . . . I don't have that much money coming in."

[1] The original contracts and collective bargaining agreements were not included in the record before the district court or on appeal. According to Plaintiffs, Defendants did not contest the existence of the contracts until the parties reached the appellate level. During oral argument, however, Defendants admitted that, when evaluating the likelihood of success on the merits, we should examine Public Act 4 and the constitutional analysis required by the Contract Clause, rather than specific terms in the contracts and collective bargaining agreements. Since the existence of the contracts was not disputed in the proceedings below, we must analyze Plaintiffs' Contract Clause claim without the benefit of reviewing the initial agreements.

Additionally, limiting health-care coverage to three plans will prevent several Plaintiffs from visiting their long-term physicians who do not accept the new insurance coverage. Defendants' alterations also eliminate health-care coverage for retirees' spouses who are eligible for alternative insurance benefits, without regard to the cost of those benefits.

Defendants' argument that the plan is "temporary" and "subject to review and renewal" does not negate a finding that the modifications arguably place a severe burden on Plaintiffs' finances and access to medical care. "[T]otal destruction of contractual expectations is not necessary for a finding of substantial impairment," and even a short-lived impairment can work substantial injury to one's contractual interests. *Energy Reserves*, 459 U.S. at 411. Here, Plaintiffs' depositions and affidavits provide a sufficient factual basis for the district court's conclusion. The court's factual findings were not clearly erroneous.

2. Significant and Legitimate Public Purpose

Having determined that the orders substantially impair Plaintiffs' contracts, the burden shifts to the state to articulate "a significant and legitimate public purpose for the regulation . . . ." *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 323 (6th Cir. 1998). A legitimate public purpose is one that addresses an important social or general economic problem, as opposed to providing a benefit to special interests. *Energy Reserves*, 459 U.S. at 412. Several courts have recognized that addressing a fiscal emergency is a legitimate public purpose. *See, e.g.*, *Home Bldg. & Loan Ass'n*, 290 U.S. at 444–48; *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 369 (2d Cir. 2006). We agree.

The orders implemented in this case were part of a larger plan to remedy Flint's dire financial situation. In a 2012 letter to Michigan's State Treasurer, which is part of the district court

record, the Emergency Manager explained that modifying the collective bargaining agreements is designed to "address the financial emergency for the benefit of the public as a whole." The district court ultimately recognized two public purposes for the impairments made to Plaintiffs' contracts: to avoid bankruptcy and to achieve a balanced budget. Defendants have articulated a legitimate public objective, as the record plainly reveals that Flint is in financial turmoil. Moreover, municipal action to remedy a fiscal emergency satisfies the public purpose inquiry. *Buffalo Teachers Fed'n*, 464 F.3d at 369.

3. Necessary and Reasonable

The last consideration under the Contract Clause requires us to examine whether the orders were reasonable and necessary to serve a legitimate public purpose. *See, e.g.*, *Mascio v. Public Emps. Ret. Sys. of Ohio*, 160 F.3d 310, 313 (6th Cir. 1998) (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242–44 (1978)). Impairing a contract is not necessary if "a less drastic modification" would have allowed the contract to remain in place. *United States Trust Co.*, 431 U.S. at 25, 30. The Supreme Court has admonished that "a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." *Id.* at 31. In any event, any impairment must be reasonable under the circumstances. *Id.*

Under the Contract Clause, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *Id.* at 26; *see also Toledo Area AFL-CIO Council*, 154 F.3d at 325. Although complete deference is inappropriate, courts should confer some respect on a state's judgment that certain legislative actions are unavoidable. *Local Div 589, Amalgamated Transit Union v. Mass.*, 666 F.2d 618, 643 (1st Cir.

1981) ("[W]here economic or social legislation is at issue, some deference to the legislature's judgment is surely called for.") In short, careful scrutiny should be applied to a state's justification for impairing contract rights when its own self-interest is at stake. *Toledo Area AFL-CIO Council*, 154 F.3d at 325.

Defendants' primary argument boils down to this: to avoid bankruptcy, it had two options—reduce the Public Safety budget or reduce retiree benefits. However, the record does not establish that bankruptcy was imminent, nor does it show that Defendants contemplated filing for bankruptcy. By extension, the record also fails to demonstrate that Defendants considered alternative strategies before modifying retiree benefits. Plaintiffs echo this sentiment, arguing that the City could have used municipal securities, among other alternatives, to pay for retiree health-care coverage. Although Defendants insist that the "only viable option" to restore fiscal order is to modify retiree health-care benefits, the record does not support their argument.

The district court concluded that altering Plaintiffs' health-care benefits was not reasonably necessary to avoid bankruptcy and balance the City's budget. Unable to find evidence in the record indicating that Flint considered or was facing bankruptcy, the court held that reducing contractual benefits was not necessary to meet the stated purpose of avoiding bankruptcy. The court observed that Flint had been operating at a deficit since at least 2007 and had not entered bankruptcy. In addition, the City's general fund deficit decreased from $14 million in 2010 to approximately $11 million in 2012. The court further questioned why Defendants planned to eliminate the $25.7 million budget deficit in a single year, when a less drastic change might have allowed the contracts and collective bargaining agreements to remain unimpaired. Without evidence that Defendants

attempted a more moderate course before modifying health-care benefits, the district court explained that "Defendants cannot simply foreclose other options, such as an additional millage or increased sewer and water fees . . . and use said foreclosure as a reason to abrogate duly-bargained for contracts." The district court did not abuse its discretion in so holding.

As it stands, Plaintiffs raise "serious, substantial [and] difficult" questions with regard to the reasonableness and necessity of the Defendants' actions, which render these issues "a fair ground for litigation and thus for more deliberate investigation." *Cafcomp Sys.*, 119 F.3d at 402. We acknowledge that courts are not in the best position to assess the prudence of one policy decision over another. *Blaisdell*, 290 U.S. at 447–48 ("Whether legislation is wise or unwise as a matter of policy is a question with which we are not concerned."). Though the wisdom of policy decisions is beyond the realm of the courts, assessing the *reasonableness* of Defendants' actions is required under the Contract Clause. Additional fact-finding may illuminate whether the orders were indeed appropriate under the circumstances of this case. But in light of the deferential standard of review and given the evidentiary support for the district court's decision, it cannot be said that the court abused its discretion in finding that Plaintiffs established a likelihood of success on the merits.

E. Irreparable Harm

To obtain preliminary injunctive relief, Plaintiffs must also demonstrate irreparable harm that is "both certain and immediate, rather than speculative or theoretical." *NACCO Materials Handling Grp., Inc. v. Toyota Materials Handling USA, Inc.*, 246 F. App'x 929, 943 (6th Cir. 2007). This court has held that "harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d

566, 578 (6th Cir. 2002). With respect to the type of harm at issue here, "[n]umerous courts have found that reductions in retiree insurance coverage constitute irreparable harm." *Golden v. Kelsey-Hayes*, 845 F. Supp. 410, 415 (E.D. Mich. 1994) (citing *United Steelworkers of Am., AFL-CIO v. Textron, Inc.*, 836 F.2d 6, 8 (1st Cir. 1987) ("[R]etirees as a group have less resources and are more vulnerable to emotional distress due to the imposition of additional insurance costs."); *Schalk v. Teledyne, Inc.*, 751 F. Supp. 1261, 1267–68 (W.D. Mich. 1990) ("[B]ecause retirees live on fixed incomes, small increases in expenses create extreme financial hardship; they are more likely to suffer uncertainty and worry over the new costs associated with the modified plan."), *aff'd*, 948 F.2d 1290 (6th Cir. 1991); *Mamula v. Satralloy Inc.*, 578 F. Supp. 563, 577 (S.D. Ohio 1983)). The district court was not mistaken in finding irreparable harm to Plaintiffs, absent injunctive relief.

In *Golden v. Kelsey-Hayes*, a federal district court held that retirees demonstrated irreparable harm because, without an injunction, they would be forced to choose between paying for needed medical care and paying for basic necessities. *Golden*, 845 F. Supp. at 415. Like the retirees in *Golden*, Plaintiffs are likely to suffer non-compensable harm as a result of Defendants changing their contracts and collective bargaining agreements. Plaintiffs have submitted three affidavits, describing how the modifications will affect their finances and ability to access specific medical treatments. For example, Plaintiff Carolyn Sparks averred that after the changes are implemented, she and her husband will no longer be able to afford all of their prescribed medications. If Defendants alter her contract by requiring her to purchase Medicare Part B at an additional cost of $198.00 per month, or pay increased deductibles of $1,000 per person, per year, these additional expenses will cause Sparks to have to either "forgo necessary medical care or give up basic necessities."

John Welch testified that he and his spouse have been patients of the same physician for the past thirty years. Under the modifications, his new insurance will not be accepted by his personal physician and he will have to change doctors. Welch suffered a heart attack in 1996, had open heart surgery, and underwent four bypasses. To monitor his condition, he has stress tests conducted once a year and also sees a cardiologist. Welch testified that this treatment is no longer a covered benefit.

Defendants reject Plaintiffs' irreparable harm argument, suggesting that they have an adequate remedy at law—namely, money damages. The injury Plaintiffs experienced is not irreparable, according to Defendants, because the modifications actually provide Plaintiffs with greater benefits than they had when they retired. Even assuming that Plaintiffs may have access to more services, altering their coverage will likely cause a significant interference in care. While money damages would provide Plaintiffs with the resources to afford the increased deductibles and co-pays after the fact, this remedy fails to make Plaintiffs whole for the interim inability to access care.

In totality, the affidavits and testimony in this case indicate that Plaintiffs' medical treatment may be interrupted by Defendants' modifications, and such a disruption in care constitutes irreparable harm. *See Golden*, 845 F. Supp. at 415. The district court's finding on this issue was not clearly incorrect because the record shows that Plaintiffs' access to medical care may be compromised. Therefore, we are not "left with the definite and firm conviction" that the court erred in finding irreparable harm. *Gypsum Co.*, 333 U.S. at 395.

F. Harm to Others/Public Interest

The remaining factors to consider are whether granting preliminary injunctive relief will cause substantial harm to others and whether the injunction is in the public interest. The district court concluded that a preliminary injunction would not cause harm to third parties and that the public interest "weighed in favor of ensuring continuing health care to members of the public." Unconvinced by Defendants' claim that without the injunction they would have to make cuts that would negatively affect the City's public safety, the court theorized that the City had other options to balance its budget. The district court also reasoned that issuing a preliminary injunction was in the public interest because it ensures that retirees will not suffer harm because of a lack of medical care. Defendants argue that the district court did not give proper weight to the evidence concerning harm to others. If preliminarily enjoined, Defendants claim they will be forced to reduce the Public Safety budget because all other departments have already received significant reductions. This potential reduction, according to Defendants, could threaten the ability of police officers and firefighters to prevent and respond to community safety problems.

Trimming the Public Safety budget may cause an increase in violence; however, the applicable standard of review is not "whether *we* would grant a preliminary injunction if we were acting in the place of the district court . . . ." *Leary*, 228 F.3d at 739 (emphasis added). Certainly, there are factors favoring Plaintiffs on one hand and the City of Flint on the other. But given the closeness of the questions presented and after balancing the various considerations, the district court did not abuse its discretion by issuing a preliminary injunction. Presumably, additional evidence will be adduced at trial, but our narrow task is to review the district court's decision to preserve the

relative positions of the parties until a hearing or trial on the merits can be held. This remedy has not been shown to be unwarranted in the present case.

Because we affirm the district court's award of a preliminary injunction based on the Contract Clause, we need not examine Plaintiffs' Due Process or Bankruptcy Clause arguments.

IV. CONCLUSION

For the reasons stated above, we affirm the district court's decision granting Plaintiffs' motion for a preliminary injunction.

2014 WL 128086
Only the Westlaw citation is currently available.
Court of Appeals of Michigan.

AFT MICHIGAN, **AFT**, AFL–CIO, Alpena–Montmorency–Alcona ISD Paraprofessionals/Teachers, Arenac Eastern Federation, Bay Arenac Skills Center Federation, Brown City Employees Federation, Brown City Federation of Teachers, Cheboygan Otsego Presque Isle Intermediate Paraprofessionals and Bus Personnel, Cheboygan Otsego Presque Isle ISD Teachers, Cheboygan Otsego Presque Isle Support Personnel, Chesaning Union Auxiliary Service Employees, Clare–Gladwin ISD Federation, Crawford AU Sable Bus Drivers Federation, Crawford AU Sable Custodians/Secretarial Federation, Crawford AU Sable Support Staff Federation, Crawford AU Sable Federation of Teachers, Crestwood Federation of Teachers, Dearborn Federation of School Employees, Dearborn Federation of Teachers, Detroit Association of Educational Office Employees, Detroit Federation of Paraprofessionals, Detroit Federation of Teachers, East Detroit Federation of Teachers, Ecorse Federation of Teachers, Fairview Federation of Teachers, Glen Lake Federation of Teachers, Hale Federation of Teachers, Hamtramck Federation of Teachers, Hemlock Federation of Teachers, Hemlock Auxiliary Service Employees, Henry Ford Community College Adjunct Faculty Organization, Henry Ford Community College Federation of Teachers, Highland Park Federation of Paraprofessionals, Highland Part Federation of Teachers, Imlay City Federation of Teachers, Inkster Federation of Teachers, Iosco ISD Intermediate Federation of Auxiliary Employees, Iosco Federation of Teachers, Kingsley Federation of Teachers, Kirtland Community College Federation of Teachers, Lake City Support Staff Federation, Lake City Teachers and Paraprofessionals Federation, Lake Shore Federation of Educational Secretaries, Lake Shore Federation Support Staff, Lake Shore Federation of Teachers, Lamphere Federation of Paraprofessionals, Lamphere Federation of Teachers, Lansing Community College Administrative Association, Les Cheneaux Federation of Support Staff, Les Cheneaux Federation of Teachers, Macomb Intermediate Federation of Paraprofessionals, Macomb Intermediate Federation of Teachers, Melvindale/Nap Paraprofessionals, Melvindale/Nap Federation of Teachers, Midland Federation of Paraprofessionals, Midland ISD Federation of Paraprofessionals, Midland ISD Federation of Teachers, Northville Federation of Paraprofessionals, Onaway Federation of School Related Personnel, Onaway Federation of Teachers, Plymouth–Canton Community Schools Secretarial Unit, Plymouth–Canton Federation of Plant Engineers, Romulus Federation of Paraprofessionals, Roseville Federation of Teachers, Rudyard Federation of Aides, Rudyard Federation of Teachers, Saginaw ISD Federation of Teachers, Tawas Area Federation of Teachers, Taylor Federation of Teachers, Utica Federation of Teachers, Van Dyke Educational Assistants Federation, Van Dyke Professional Personnel, Warren Woods Federation of Paraprofessionals, Washtenaw Intermediate School Employees Federation, Waterford Association of Support Personnel, Wayne County Community College Professional & Administrative Assoc, Wayne County Community College Federation of Teachers, Wayne County Resa Salaried Staff, Wexford–Missaukee ISD Federation of Teachers, Whitefish Township Federation of Teachers,
Plaintiffs–Appellants,
and
Michigan Education Association, Plaintiff,
v.
STATE of **Michigan**, Defendant–Appellee,
and
State Treasurer, John E. Dixon, Public School Employees Retirement System, Public School Employees Retirement System Board, Phil Stoddard, Department of Technology Management and Budget, and Trust for Public Employee Retirement Health Care Fund,
Defendants.
Michigan Education Association,
Plaintiff–Appellant,
and
AFT Michigan, **AFT**, AFL–CIO, Alpena–Montmorency–Alcona ISD Paraprofessionals/Teachers, Arenac Eastern Federation, Bay Arenac Skills Center Federation, Brown City Employees Federation, Brown City Federation of Teachers, Cheboygan Otsego Presque Isle Intermediate Paraprofessionals and Bus Personnel, Cheboygan Otsego Presque Isle ISD Teachers, Cheboygan Otsego Presque Isle Support Personnel, Chesaning Union Auxiliary Service Employees, Clare–Gladwin ISD Federation, Crawford AU Sable Bus Drivers

Federation, Crawford AU Sable Custodians/Secretarial Federation, Crawford AU Sable Support Staff Federation, Crawford AU Sable Federation of Teachers, Crestwood Federation of Teachers, Dearborn Federation of School Employees, Dearborn Federation of Teachers, Detroit Association of Educational Office Employees, Detroit Federation of Paraprofessionals, Detroit Federation of Teachers, East Detroit Federation of Teachers, Ecorse Federation of Teachers, Fairview Federation of Teachers, Glen Lake Federation of Teachers, Hale Federation of Teachers, Hamtramck Federation of Teachers, Hemlock Federation of Teachers, Hemlock Auxiliary Service Employees, Henry Ford Community College Adjunct Faculty Organization, Henry Ford Community College Federation of Teachers, Highland Park Federation of Paraprofessionals, Highland Part Federation of Teachers, Imlay City Federation of Teachers, Inkster Federation of Teachers, Iosco ISD Intermediate Federation of Auxiliary Employees, Iosco Federation of Teachers, Kingsley Federation of Teachers, Kirtland Community College Federation of Teachers, Lake City Support Staff Federation, Lake City Teachers and Paraprofessionals Federation, Lake Shore Federation of Educational Secretaries, Lake Shore Federation Support Staff, Lake Shore Federation of Teachers, Lamphere Federation of Paraprofessionals, Lamphere Federation of Teachers, Lansing Community College Administrative Association, Les Cheneaux Federation of Support Staff, Les Cheneaux Federation of Teachers, Macomb Intermediate Federation of Paraprofessionals, Macomb Intermediate Federation of Teachers, Melvindale/Nap Paraprofessionals, Melvindale/Nap Federation of Teachers, Midland Federation of Paraprofessionals, Midland ISD Federation of Paraprofessionals, Midland ISD Federation of Teachers, Northville Federation of Paraprofessionals, Onaway Federation of School Related Personnel, Onaway Federation of Teachers, Plymouth–Canton Community Schools Secretarial Unit, Plymouth–Canton Federation of Plant Engineers, Romulus Federation of Paraprofessionals, Roseville Federation of Teachers, Rudyard Federation of Aides, Rudyard Federation of Teachers, Saginaw ISD Federation of Teachers, Tawas Area Federation of Teachers, Taylor Federation of Teachers, Utica Federation of Teachers, Van Dyke Educational Assistants Federation, Van Dyke Professional Personnel, Warren Woods Federation of Paraprofessionals, Washtenaw Intermediate School Employees Federation, Waterford Association of Support Personnel, Wayne County Community College Professional & Administrative Assoc, Wayne County Community College Federation of Teachers, Wayne County Resa Salaried Staff, Wexford–Missaukee ISD Federation of Teachers, Whitefish Township Federation of Teachers, Plaintiffs,

v.

State of **Michigan**, State Treasurer, John E. Dixon, Public School Employees Retirement System, Public School Employees Retirement System Board, Phil Stoddard, Department of Technology Management and Budget, and Trust For Public Employee Retirement Health Care Fund, Defendant–Appellees.

Docket Nos. 313960, 314065. | Decided Jan. 14, 2014, at 9:05 a.m.

Court of Claims; LC No. 12–000104–MM.

Before: SAAD, P.J., and K.F. KELLY and GLEICHER, JJ.

Opinion

K.F. KELLY, J.

Plaintiffs, AFT et al and MEA et al,[1] representative organizations of public school employees, appeal of right the Court of Claims' orders dismissing their challenges to provisions of 2012 PA 300. 2012 PA 300, effective September 4, 2012, amended the Public School Employees Retirement Act (PSERA), MCL 38.1301 *et seq.*, and altered future healthcare and retirement benefit plans available to public school employees for services performed after December 1, 2012. Finding no error warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Pursuant to MCL 38.1343g and MCL 38.1384b, PSERA members were asked to make a choice in terms of their future retirement pension benefits:

> 1. Members of the Basic Plan, who historically contributed nothing to their pensions, would now be expected to contribute 4% of their income to their pensions. Those individuals hired between January

1990 and July 2010 and those former Basic Plan members who transferred into the Member Investment Plan (MIP) would increase their contribution to 7%. Members who opted into the Basic Plan and MIP Plan would maintain the current 1.5% pension multiplier.

2. Members could maintain current contribution rates, freeze existing benefits at the 1.5% multiplier, and receive a 1.25% pension multiplier for future years of service.

3. Members could freeze existing pension benefits and move into a defined contribution, 401(k)-style, plan with a flat 4% employer contribution for future service.

Additionally, under MCL 38.1343e members were asked to "opt in" or "opt out" of retiree healthcare benefits; members could either contribute 3% of their compensation to receive the future benefit, or they could choose to receive no retiree healthcare benefits at retirement. MCL 38.1391a(8) further provided that a member who opted into the retiree healthcare program, but did not meet the eligibility requirements (i.e., due to failure to work the requisite number of years) would be refunded his or her contribution starting at age 60 over a period of 60 months.

In two separate actions, plaintiffs filed complaints alleging: breach of contract and diminishment of contract, unconstitutional diminishment of members' accrued financial benefits, denial of substantive due process, and unjust enrichment to the state. The Court of Claims consolidated the two cases and considered the parties' competing motions for summary disposition. The Court of Claims concluded:

> As much as I would like to strike the section that deals with the state keeping the money on the healthcare and find that it's an unjust enrichment or a taking ... My problem is this, if it were the only choice I would strike it down. The problem is we have informed consent and there are a number of choices, so the legislature in putting together this law thought about that. It's very clear to me. They are giving choices and they are saying be careful, because if you leave early, for whatever reason, we're going to hang on to your money and you'll get it at the age of 60 as you retire and you'll get some money back on top of it but it's probably not going to be a lot of money because we're going to use it in the meantime. Now, I'm not happy about that and it's probably usury, but it's with that party's consent because they certainly have enough time, especially with the striking of the 52 days, to do the research, to do the math, to consult with an accountant, a financial planner, an advisor, and maybe not make that choice so the state doesn't have their money. On the other hand, if they're not a person who can save money, maybe that is the best choice for them.
>
> As to the rest of the sections, again, there is this delineation between vested and non-vested benefits. It does not appear to me that the legislature is touching anything that is vested.
>
> And as to the brochures, here's the problem. I have made rulings against the state for exactly this. Treasury, for example, puts out these advisories about how our tax code is going to change and how people should pay taxes and they've come in here on cases saying that a business did not follow these advisory tax rules and they have charged people with additional taxes because they didn't follow this advisory rule. And I've said, well, this is only advisory, it's not in the tax code yet so, state, you can't have your way and the taxpayer wins. Because there's also disclaimers there.
>
> And I find the same ruling here. There are pamphlets that the state puts out about here's how your pension is going to work and there's disclaimers on it. It's really only advisory in nature about how—here's how your retirement works. I don't believe that a pamphlet can be part of a contract. I think it's nice that it's out there. I think it helps, but unless it is attached to the contract, it's got everybody's signatures, and it's made part of the black and white contract, it's not part of the contract. So I am finding that as informative as those pamphlets are, they're not part of the contract. It's consistent with other rulings that I've made that I have been upheld on.
>
> And so I think what the state has done with Public Act 300 of 2012 is left intact the retirement system with what's been vested and they are making members make elections on unvested pieces. So with the exception of the 52 days, I'm leaving the rest intact.[2]

Plaintiffs now appeal as of right[3] and take issue with four separate provisions of 2012 PA 300:

- MCL 38.1343e, requiring a 3% contribution towards retiree healthcare.
- MCL 38.1343g, requiring a 4% contribution to pension to remain in the Basic Plan.
- MCL 38.1384b, providing a "sanction" of reduced multiplier in calculating pension benefits for those individuals who opt-out of §

43g.

• MCL 38.1391a(8), providing the mechanism for refunding contributions to individuals who opted into the retiree healthcare plan but who ultimately fail to qualify to receive such benefits.

II. ANALYSIS

A. STANDARDS OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v. Rozwood,* 461 Mich. 109, 118; 597 NW2d 817 (1999). Whether a contract exists is a question of law that this Court reviews de novo. *Kloian v. Domino's Pizza, LLC,* 273 Mich.App 449, 452; 733 NW2d 766 (2006). Finally, the question of whether 2012 PA 300 violates the constitution is a question of law that is reviewed de novo. *In re Williams,* 286 Mich.App 253, 271; 779 NW2d 286 (2009).

B. BREACH OF CONTRACT

Plaintiffs argue that 2012 PA 300 unconstitutionally impairs existing contractual obligations to pension and retiree healthcare benefits in violation of both the federal and state constitutions. We disagree.

The constitutions of the United States and the State of Michigan provide, in relevant part:

> No State shall ... pass any ... Law impairing the Obligation of Contracts ... [US Const, art I, § 10, cl 1.]
> No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted. [Const 1963, art 1, § 10.]

We have recently set forth the process for determining whether a statute violates the contract clauses:

> Currently, whether a state statute violates the Contract Clause is determined by reference to a three-step inquiry ... First, courts must determine whether the state law has operated as a substantial impairment of a contractual relationship. If it constitutes a substantial impairment, the court must look at whether the justification for the state law is based on a significant and legitimate public purpose. If a legitimate public purpose can be identified, the court looks at whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. With respect to this third inquiry, as is customary in reviewing economic and social regulation, ... courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure unless the State is one of the contracting parties. [*Wells Fargo Bank, NA v. Cherryland Mall Ltd Partnership,* 300 Mich.App 361, 373–374; 835 NW2d 593 (2013) (footnotes, citations, and internal quotations omitted).]

1. MEMBER HANDBOOKS AND BROCHURES

AFT argues that the various pamphlets, handbooks and informative brochures published by the state evidence a contract between the state and the members, whereby the state specifically indicated that a 1.5% multiplier would be used to calculate pension benefits. Alternatively, AFT argues that there is an "implied in law" contract.

"A party claiming a breach of contract must establish by a preponderance of the evidence (1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." *Miller–Davis Co v. Ahrens Const, Inc (On Remand),* 296 Mich.App 56, 71; 817 NW2d 609 (2012). To maintain a cause of action for breach of contract, a party must establish the existence of a contract and then must demonstrate that the contract was breached. *Pawlak v. Redox Corp,* 182 Mich.App 758, 765; 453 NW2d 304 (1990). A valid contract has five elements: "(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Calhoun Co v. Blue Cross & Blue Shield of Mich,* 297 Mich.App 1,

13; 824 NW2d 202 (2012).

An implied-in-law contract is a legal fiction "to enable justice be accomplished" and to avoid unjust enrichment, even if there was no meeting of the minds and no contract was intended. *Detroit v. Highland Park,* 326 Mich. 78, 100; 39 NW2d 325 (1949). A contract will be implied in law if a party is unjustly enriched. *Martin v. East Lansing School Dist,* 193 Mich.App 166, 177; 483 NW2d 686 (1992). To sustain an unjust enrichment claim, a plaintiff must demonstrate (1) the defendant's receipt of a benefit from the plaintiff and (2) an inequity to plaintiff as a result. *Dumas v. Auto Club Ins Ass'n,* 437 Mich. 521, 546; 473 NW2d 652 (1991); *Karaus v. Bank of New York Mellon,* 300 Mich.App 9, 23; 831 NW2d 897 (2012). Stated differently, to prevent unjust enrichment, the law will imply a contract only where the defendant has been inequitably enriched at the expense of the plaintiff. *Morris Pumps v. Centerline Piping, Inc,* 273 Mich.App 187, 195; 729 NW2d 898 (2006). Under those circumstances, courts may imply a contract to prevent unjust enrichment. *Martin,* 193 Mich.App at 177. However, courts may imply a contract only where the parties do not have an express contract covering the same subject matter. *Id.*

AFT argues that publications generated by the Retirement System clearly set forth that a member's pension would be based on a 1.5% multiplier. By way of example, AFT points to a 1990 pamphlet, titled "An Introduction to Your Retirement Plan." Under "Pension Formula", the document provides "Your Retirement Plan provides a benefit that is determined by a formula. The formula is your final average salary times 1.5% (.015) times your total years of service credit." However, this same document contains the following disclaimer:

> This booklet was written as an introduction to your retirement plan. You should find it very helpful in the early stages of your planning for retirement. It is designed to answer commonly asked questions in a simple and easy to understand style. However, information in this booklet is not a substitute for the law. If differences of interpretation occur, the law governs. *The law may change at any time altering information in this booklet.* [Emphasis added.]

AFT also points to a 1997 publication which provides:

> Your pension is calculated according to the following formula:
>
> *Your final average compensation*
>
> *X*
>
> *1.5% (.015)*
>
> *X*
>
> *Your years of service credit =*
>
> *Your annual pension*

Again, however, the same publication provides the following disclaimer:

> Remember, this book is a summary of the main features of the plan and not a complete description. The operation of the plan is controlled by the Michigan Public School Employees Retirement Act (Public Act 300 of 1980, as amended). *If the provisions of the Act conflict with this summary, the Act controls.* [Emphasis added .]

The Court of Claims did not err in concluding that the documents did not form an enforceable contract. The pamphlets and brochures were simply an informational explanation of the then-existing formula; the state was not bound, in perpetuity, by its contents. Importantly, the disclaimers contained within each of the documents plainly demonstrates that the Retirement System manifested no intent to be contractually bound by the formula and clearly warned that pensions were a product of legislation, which was subject to change at any time. These same disclaimers also compel a finding that AFT's claim for breach of implied contract must fail.

2. 1980 PA 300

AFT argues that 1980 PA 300 created a contract between the state and public school employees; since 1945 every public school employee was given a clear promise that the retirement multiplier used to calculate pension benefits would be 1.5%. However, this notion was specifically rejected by our Supreme Court in *Studier v. Michigan Pub School Employees' Retirement Bd,* 472 Mich. 642; 698 NW2d 350 (2005).

At issue in *Studier* was whether 1980 PA 300 created a contract with public school retirees such that retiree healthcare benefits could not be changed without running afoul of the contract clauses of the federal and state constitutions. *Id.* at 645. Amendments to 1980 PA 300 increased the amount of deductibles that retirees were required to pay and also increased the copays and out-of-pocket expenses that retirees paid for prescription drugs. *Id.* at 646. Several public school retirees brought suit, arguing, inter alia, that the copay and deductible increases impaired an existing contractual obligation. *Id.* at 647–648.

In rejecting that the statute created a contractual right to receive healthcare benefits, our Supreme Court noted that "a fundamental principle of the jurisprudence of both the United States and this state is that one legislature cannot bind the power of a successive legislature." *Id.* at 660. It further noted "the strong presumption that statutes do not create contractual rights." *Id.* at 661. This is in keeping with " 'the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state.' " *Id.* quoting *Nat'l R Passenger Corp v. Atchison, Topeka & Santa Fe R Co,* 470 U.S. 451, 465–466; 105 S Ct 1441; 84 L.Ed.2d 432 (1985).

Thus, "[i]n order for a statute to form the basis of a contract, the statutory language must be plain and susceptible of no other reasonable construction than that the Legislature intended to be bound to a contract" and "absent an adequate expression of an actual intent of the State to bind itself, courts should not construe laws declaring a scheme of public regulation as also creating private contracts to which the state is a party." *Studier,* 472 Mich. at 662 (internal quotations omitted). A legislature may demonstrate its intent to be contractually bound by using terms such as "contract, "covenant" or "vested rights." *Id.* at 663. Our Supreme Court noted that nothing in MCL 38.1391 (the statute establishing the healthcare benefits) indicated a contract:

> Indeed, by its plain language, the statute merely shows a policy decision by the Legislature that the retirement system pay "the entire monthly premium or membership or subscription fee" for the listed healthcare benefits on behalf of a retired public school employee who chooses to participate in whatever plan the board and the Department of Management and Budget authorize. However, nowhere in the statute did the Legislature require the board and the department to authorize a particular plan containing a specific monthly premium, membership, or subscription fee or, alternatively, explicitly preclude the board and the department from amending whatever plan they authorize. Additionally, nowhere in the statute did the Legislature require the board and the department to authorize a plan containing specified deductibles and copays. In fact, nowhere in the statute did the Legislature even mention deductibles and copays. Further, nowhere in the statute did the Legislature covenant that it would not amend the statute to remove or diminish the obligation of the MPSERS to pay the monthly premium, membership, or subscription fee; nor did it covenant that any changes to the plan by the board and the department, or amendments to the statute by the Legislature, would apply only to a specific class or group of public school retirees. Again, had the Legislature intended to surrender its power to make such changes, it would have done so explicitly. [*Id.* at 664–665 (footnotes omitted).]

The Supreme Court also noted that previous legislatures had exercised their powers to amend the statute throughout the years, which was further indication that no contractual rights were created. *Id.* at 665–666.

We conclude that *Studier* applies to plaintiffs' claims and that 1980 PA 300 did not create an enforceable contract. There is absolutely nothing in the statute that indicates the legislature's intent to enter into a contract and bind future legislatures. "Had the Legislature intended to surrender its legislative powers through the creation of contractual rights, it would have expressly done so by employing such terms as " 'contract,' 'covenant,' or 'vested rights.' " *Id.* at 663–664.

3. CONST 1963, ART 9, § 24

Finally, plaintiffs argue that pension benefits are contractual rights as guaranteed by the state constitution and that 2012 PA 300 unconstitutionally diminishes pension benefits in violation of Const 1963, art 9, § 24. However, as will be discussed at further length below, § 24 protects only those pension benefits that have already accrued, not future benefits.

Accordingly, because there was no breach of contract, it follows that there was no impairment of contract under either the state or federal constitutions.

C. PENSION BENEFITS

Plaintiffs argue that 2012 PA 300 violates Const 1963, art 9, § 24, which provides:

> The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.
>
> Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

Again, we hold that *Studier* is applicable here. At issue in *Studier* was whether healthcare benefits paid to public school retirees constituted "accrued financial benefits" subject to protection from diminishment or impairment under Const 1963, art 9, § 24. *Studier,* 472 Mich. at 645.

Our Supreme Court concluded that "healthcare benefits are not protected by Const 1963, art 9, § 24 because they neither qualify as 'accrued' benefits nor 'financial' benefits as those terms were commonly understood at the time of the Constitution's ratification and, thus, are not 'accrued financial benefits.' " *Id.* at 658–659. First, as it related to the term "accrued", the Court held that "the ratifiers of our Constitution would have commonly understood 'accrued' benefits to be benefits of the type that increase or grow over time-*such as a pension payment or retirement allowance that increases in amount along with the number of years of service a public school employee has completed.*" *Id.* at 654 (emphasis added). Next, as it related to the term "financial," the Court noted that healthcare benefits did not qualify as financial benefits because "the ratifiers of our Constitution would have commonly understood 'financial' benefits to include only those benefits that consist of monetary payments, and not benefits of a nonmonetary nature such as healthcare benefits." *Id.* at 655. "[T]he ratifiers would have commonly understood the phrase 'accrued financial benefits' to be one of limitation that would restrict the scope of protection provided by art 9, § 24 to monetary payments for *past* services." *Id.* at 657–658.

Therefore, pursuant to *Studier,* pension benefits are the type that increase or grow over time commensurate with the number of years of service a public school employee has completed and such benefits are protected by Const 1963, art 9, § 24. However, such pension benefits are protected by § 24 only to the extent that they are for *past* services. 2012 PA 300 does nothing to impact or impair members' vested pension benefits. Members will still have the 1.5% multiplier applied to services rendered before December 2012. It is only future service that becomes subject to a reduced 1 .25% multiplier should a member elect not to contribute 4% to his or her pension fund.

We also find persuasive our Supreme Court's advisory opinion *Advisory Opinion re Constitutionality of 1972 PA 258,* 389 Mich. 659; 209 NW2d 200 (1973), which addressed the constitutionality of a statute requiring members to pay an increased contribution to pensions with no corresponding increase in benefits.[4] The Court first noted that pensions were no longer considered a mere gratuity since the passage of Const 1963, art 9, § 24. *Id.* at 662–663. It further noted:

> Under this constitutional limitation the legislature cannot diminish or impair accrued financial benefits, but we think it may properly attach new conditions for earning financial benefits which have not yet accrued. Even though compliance with the new conditions may be necessary in order to obtain the financial benefits which have accrued, we would not regard this as a diminishment or impairment of such accrued benefits unless the new conditions were unreasonable and hence subversive of the constitutional protection. [*Id.* at 663–664.]

Even absent the advisory opinion's precedential value, when read in conjunction with *Studier,* it is plain that 2012 PA 300 does nothing to diminish or impair a member's vested pension benefits; only future benefits are implicated. 2012 PA 300, therefore, does not run afoul of Const 1963, art 9, § 24, and plaintiffs' claims are without merit.

MEA's argument that 2012 PA 300 violates the second clause of § 24 must also fail. The *Studier* Court explained:

> That art 9, § 24 only protects those financial benefits that increase or grow over time is not only supported but, indeed, confirmed by the interaction between the first and second clauses of that provision. Specifically, the first clause contractually binds the state and its political subdivisions to pay for retired public employees' "accrued financial benefits...." Thereafter, the second clause seeks to ensure that the state and its political subdivisions will be able to fulfill this contractual obligation by requiring them to set aside funding each year for those "[f]inancial benefits arising on account of service rendered in each fiscal year...." Thus, because the second clause only requires the state and its political subdivision to set aside funding for "[f]inancial benefits arising on account of service rendered in each fiscal year" to fulfill their contractual obligation of paying for "accrued financial benefits," it reasonably follows that "accrued" financial benefits consist only of those "[f]inancial benefits arising on account of service rendered in each fiscal year...." [*Id.* at 654–655 (footnotes omitted).]

"In years prior to the Constitution of 1963, the Legislature did not always make adequate appropriations to maintain the MPSERS on an actuarially sound basis.... The practical effect of this underfunding was that many pensioners had accumulated years of service for which insufficient money had been set aside in the pension reserve funds to pay the benefits to which their years of service entitled them." *Kosa v. Treasurer of State of Mich,* 408 Mich. 356, 365; 292 NW2d 452 (1980). The Retirement System used current members' contributions to pay for unfunded accrued liabilities of retirees' pensions that had accrued prior to the passage of the 1963 Constitution. The Supreme Court held that "borrowing" from post–1963 Constitution reserves to pay pre-constitution benefits violated Const 1963, art 9, § 24 by using current service funds to finance unfunded accrued liabilities. *Id*. at 367–368.

The *Kosa* Court analyzed the history of the legislation by looking to the constitutional debates. It noted that "[a] clear distinction must be drawn between the right to receive pension benefits and the funding method adopted by the Legislature to assure that monies are available for the payment of such benefits." *Id* at 371. As one delegate noted, "It is not intended that an individual should ... be given the right to sue the employing unit to require the actuarial funding of past service benefits ... What it is designed to do is to say that when his benefits come due, he's got a contractual right to receive them." *Id.* at 370 n21.

In fact, contrary to plaintiffs' argument, "[t]he second paragraph of art 9, § 24 expressly mandates townships and municipalities to fund all public employee pension systems to a level *which includes unfunded accrued liabilities,*" which " 'are the estimated amounts which will be needed according to actuarial projections to fulfill presently existing pension obligations ...' " *Shelby Twp Police & Fire Retirement Bd v. Shelby Twp,* 438 Mich. 247, 255–256, n4; 475 NW2d 249 (1991) (emphasis added) quoting *Kosa,* 408 Mich. at 364 n1.

Accordingly, 2012 PA 300 does not violate Const 1963, art 9, § 24 as it relates to members' pensions.

D. HEALTHCARE BENEFITS

Plaintiffs contend that 2012 PA 300 does not cure the constitutional deficiencies found in *AFT Michigan v. State,* 297 Mich.App 597; 825 NW2d 595 (2012). We disagree.

In *AFT,* several public school employees and their representative organizations brought a challenge to MCL 38.1343e, which required public school districts and reporting units to withhold three percent of the employees' wages and remit the amount to the Retirement System as "employer contributions" to the trust that funded retiree healthcare benefits. *AFT,* 297 Mich.App at 603. The plaintiffs argued that the statute resulted in the impairment of contracts and violated their rights under both the takings causes and the due process clauses of the federal and state constitutions. The trial court held that the statute did not violate the contract clauses, but that it did violate the plaintiffs' rights under both the takings clauses and due process clauses of the federal and state constitutions. *Id.* at 606–607.

This Court disagreed with the trial court's conclusion that there was no violation of contract clauses. We held that "MCL 38.1343e operates as a substantial impairment of the employment contracts between plaintiffs and the employing educational entities. The contracts provide for a particular amount of wages and the statute requires that the employers not pay the contracted-for wages, but instead pay three percent less than the contracts provide." *AFT,* 297 Mich.App at 610. The Court noted, however, that while there was clearly substantial impairment of the employees' contract, the inquiry into whether there has been a violation of the contracts clause necessarily involved an examination as to "whether the particular impairment is necessary to the public good." *Id.* at 612 (quotations omitted). And, "[b]ecause governmental entities are parties to the contracts and benefit from the impairment, we are to employ heightened scrutiny in our review of the statute." *Id.* The Court looked to cases from other jurisdictions wherein governments implemented temporary actions to deal with budget shortfalls, such as implementing mandatory furlough days. These jurisdictions found such actions tolerable because, although clearly an impairment of contract, such actions were implemented after other attempts to reduce budgetary shortfalls, including layoffs and reductions in services. Additionally, the employees' work hours were reduced to correspond with the reduction in wages. *Id.* at 613–614. In contrast, MCL 38.1343e was not temporary; rather, it was a permanent reduction in salary meant as a long-term mechanism to restructure benefits. *Id.* at 614. "The state has not shown that it first undertook to reduce retiree healthcare benefits, or to require present retirees to contribute to their own healthcare plans, or to restructure the benefits system in any way other than to legislate state-imposed modifications of freely negotiated contracts." *Id.* at 615.

In further finding that the statute was an unconstitutional infringement on the plaintiffs' substantive due process rights, this Court explained:

> Defendants argue that the compelled contributions are not arbitrary because they are assessed against public school employees to support a fund that pays for retiree healthcare for public school employees. This, however, is an overly general characterization that gives the false impression that plaintiff employees are being required to contribute toward the funding of their own retirement benefits. The *mandatory contributions* imposed on current public school employees do not go to fund their own retirement benefits but, instead, to pay for retiree healthcare for already-retired public school employees.
>
> While the present employees and the retired employees have in common their present or former employment by a public school employer, that does not mean that their interests as individuals (or even as groups of employees) are identical. Defendants have offered no legal basis for the conclusion that it comports with due process to require present school employees to transfer three percent of their incomes in order to fund the retirement benefits of others. Rather, it is a *mandatory, direct transfer* of funds from one discrete group, present school employees, for the benefit of another, retired school employees. The fact that these groups share employers does not render the scheme outside the constitutional protection of substantive due process. [*Id.* at 622–623 (emphasis added).]

Additionally, under *Studier,* there was no guarantee that current employees would enjoy retiree healthcare benefits because such were not "accrued financial benefits" and, therefore, subject to revision and total revocation.

> We cannot envision a court approving as constitutional a statute that requires certain individuals to turn a portion of their wages over to the government in return for a "promise" that the government will return the monies, with interest, in 20 years when the government retains the unilateral right to "cancel" the "promise" at any time and does not even agree that, if they do so, the monies taken will be returned. School employees cannot constitutionally be required to "loan" money to their employer school districts, with no enforceable right to receive anything in exchange and without even a binding guarantee that the "loan" will be repaid. [*Id.* at 625 (footnote omitted).]

In contrast to 2010 PA 75, employee contributions under 2012 PA 2012 are now voluntary. A member may now choose to either continue to participate in the retiree healthcare program and contribute 3% of his or her salary to do so, or the member may simply opt out of the program altogether. Members who opt in but fail to qualify for retiree healthcare benefits will be refunded their investment once they turn 60. At that time, they will receive an allowance over a 60–month period, utilizing the same multiplier as for pension benefits. Thus, the constitutional infirmities found in *AFT* have now been cured. Although plaintiffs argue that this unreasonably impacts members who have already "vested," *Studier* clearly provides that retiree healthcare benefits are not accrued financial benefits implicated by Const 1963, art 9, § 24.

Accordingly, 2012 PA 300 does not violate Const 1963, art 9, § 24 as it relates to retiree healthcare benefits.

E. SUBSTANTIVE DUE PROCESS

As an initial matter, although the State argues that plaintiffs cannot claim constitutional deprivations under both the takings clauses and the substantive due process clauses of the state and federal constitutions, this argument appears to have been specifically rejected in our Court's decision in *AFT,* where this Court addressed the substantive arguments of both issues. In addition, although the state correctly argues that AFT has failed to preserve this issue for appellate view because it did not make such a broad argument in the Court of Claims, MEA has consistently argued that 2012 PA 300 violates substantive due process. Therefore, a thorough examination of the issue is warranted.

US Const amend XIV provides that "no State shall deprive any person of life, liberty, or property, without due process of law." Const 1963, art 1, § 17 provides that "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law ."

> [A]lthough the text of the Due Process Clauses provides only procedural protections, due process also has a substantive component

> that protects individual liberty and property interests from arbitrary government actions regardless of the fairness of any implementing procedures. The right to substantive due process is violated when legislation is unreasonable and clearly arbitrary, having no substantial relationship to the health, safety, morals, and general welfare of the public. In the context of government actions, a substantive due process violation is established only when the governmental conduct is so arbitrary and capricious as to shock the conscience. [*Bonner v. City of Brighton,* 298 Mich.App 693, 705–706; 828 NW2d 408 (2012) (citations, footnotes, and internal quotations omitted).]

Additionally,

> The party challenging a legislative enactment subject to rational basis review must negative every conceivable basis which might support it. Under rational basis review, it is constitutionally irrelevant what reasoning in fact underlay the legislative decision. We will be satisfied with the government's rational speculation linking the regulation to a legitimate purpose, even unsupported by evidence or empirical data. Thus, if a statute can be upheld under any plausible justification offered by the state, or even hypothesized by the court, it survives rational-basis scrutiny. [*Wells Fargo Bank,* 300 Mich.App at 381, quoting *American Express Travel Related Servs Co, Inc v. Kentucky,* 641 F3d 685, 688–689 (CA 6, 2011) (internal quotations and citations omitted).]

As previously stated, in striking down 2010 PA 75, as "unreasonable, arbitrary, and capricious and violat[ive of] the Due Process Clause," this Court explained:

> Defendants argue that the compelled contributions are not arbitrary because they are assessed against public school employees to support a fund that pays for retiree healthcare for public school employees. This, however, is an overly general characterization that gives the false impression that plaintiff employees are being required to contribute toward the funding of their own retirement benefits. The *mandatory contributions* imposed on current public school employees do not go to fund their own retirement benefits but, instead, to pay for retiree healthcare for already-retired public school employees.
>
> While the present employees and the retired employees have in common their present or former employment by a public school employer, that does not mean that their interests as individuals (or even as groups of employees) are identical. Defendants have offered no legal basis for the conclusion that it comports with due process to require present school employees to transfer three percent of their incomes in order to fund the retirement benefits of others. Rather, it is a *mandatory, direct transfer* of funds from one discrete group, present school employees, for the benefit of another, retired school employees. The fact that these groups share employers does not render the scheme outside the constitutional protection of substantive due process. [*AFT,* 297 Mich.App at 622–623 (emphasis added).]

Additionally, this Court acknowledged that, under *Studier,* there was no guarantee that current employees would enjoy retiree healthcare benefits because such were not "accrued financial benefits" and, therefore, subject to revision and total revocation.

> We cannot envision a court approving as constitutional a statute that *requires* certain individuals to turn a portion of their wages over to the government in return for a "promise" that the government will return the monies, with interest, in 20 years when the government retains the unilateral right to "cancel" the "promise" at any time and does not even agree that, if they do so, the monies taken will be returned. School employees cannot constitutionally be *required* to "loan" money to their employer school districts, with no enforceable right to receive anything in exchange and without even a binding guarantee that the "loan" will be repaid. [*Id.* at 625 (footnote omitted) (emphasis

added.]

The Court noted that § 43e "provides that the government confiscate the income of one discrete group in order to fund a specific governmental obligation to another discrete group." *Id.* at 627.

These constitutional infirmities have been cured by the voluntary nature of 2012 PA 300. Members may now opt in or opt out of the legislative scheme. Their voluntary contributions will be used to pre-fund their benefits. And, although plaintiffs complain that there is no guarantee of future healthcare benefits, under MCL 38.1391a(8), members' contributions are now protected with a refund mechanism. As the Court of Claims noted, it is clear that the Legislature carefully crafted 2012 PA 300 with the infirmities noted by *AFT* in mind.

The state, in enacting 2012 PA 300, has set forth a legitimate governmental purpose to help fund retiree healthcare benefits while ensuring the continued financial stability of public schools. It is undisputed that in recent years public schools have been required to remit increasingly higher percentages of their payrolls to pay for the healthcare of retirees and their dependents. Healthcare costs are expected to continue to rise in the future. By seeking voluntary participation from members, the statute rationally relates to the legitimate governmental purpose of maintaining healthcare benefits for retirees while easing financial pressures on public schools.

That members have no assurance of receiving healthcare benefits upon retirement does not defeat the fact that 2012 PA 300 is reasonably related to a legitimate governmental purpose; instead, plaintiffs' arguments are focused primarily on whether the plan is ideal, which is not our inquiry. Plaintiffs have not negated the conclusion that the legislation reasonably relates to a legitimate governmental purpose.

Accordingly, we hold 2012 PA 300 does not violate members' substantive due process rights under the state or federal constitutions.

F. UNLAWFUL TAKING AND UNJUST ENRICHMENT

Finally, plaintiffs assert that the healthcare contributions of 2012 PA 300 are an unlawful taking of their members property and the state is unjustly enriched. We disagree.

US Const amend V provides "nor shall private property be taken for public use, without just compensation." Similarly, Const 1963, art 10, § 2 provides that "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law."

Unjust enrichment is an equitable doctrine. *Morris Pumps v. Centerline Piping, Inc,* 273 Mich.App 187, 193; 729 NW2d 898 (2006). It is the equitable counterpart of a legal claim for breach of contract. *Keywell & Rosenfeld v. Bithell,* 254 Mich.App 300, 328; 657 NW2d 759 (2002). "Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another." *McCreary v. Shields,* 333 Mich. 290, 294; 52 NW2d 853 (1952) (quotation marks and citation omitted). "[I]n order to sustain a claim of ... unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Morris Pumps,* 273 Mich.App at 195.

In *AFT,* this Court concluded that 2010 PA 75 violated the takings clauses of the federal and state constitutions, rejecting the defendants' assertion that the takings clauses could not be implicated. Rather, "where the government does not merely impose an assessment or require payment of an amount of money without consideration, but instead asserts ownership of a specific and identifiable 'parcel' of money, it does implicate the Takings Clause. Indeed, the United States Supreme Court has termed such actions violations 'per se' of the Takings Clause." *AFT,* 297 Mich.App at 618, quoting *Brown v. Legal Foundation of Washington,* 538 U.S. 216, 235; 123 S Ct 1406; 155 L.Ed.2d 376 (2003). Thus, "[b]ecause MCL 38.1343e takes private property without providing any form of compensation, the trial court correctly ruled that the statute violates the Takings Clauses of the Fifth Amendment and Const 1963, art 10, § 2." *Id.* at 621.

However, there is no "taking" under 2012 PA 300 because participation in the retiree healthcare system is now voluntary. Unlike in *AFT* where the retiree healthcare contributions were mandatory and involuntary, members under the new legislation now have a choice. Thus, it cannot be argued that members' wages have been seized or confiscated, as was the case in *AFT.* In addition, § 91a(8) of 2012 PA 300 provides for repayment of member contributions for those individuals who have elected into the retiree healthcare system, but otherwise fail to vest in the system. Members are provided a full refund increased by 1.5% multiplied by the total number of years of contributions. While plaintiffs argue that they

are deprived of the time-value of this money, that does not negate the fact that the process is entirely voluntary.

Accordingly, 2012 PA 300 neither unlawfully takes members' property nor does it amount to unjust enrichment.

Affirmed. No costs awarded to either party, a public question being involved. MCR 7.216(A)(7) and MCR 7.219(A).

GLEICHER, J. (concurring).

I concur with the result reached by the majority. I write separately to clarify my reasons for doing so.

In broad outline, plaintiffs have raised constitutional challenges to two portions of 2012 PA 300. The first involves pension benefits. Pursuant to the act, members of the Michigan Public School Employees' Retirement System (MPSERS) must increase their payroll deductions to maintain the 1.5 percent pension factor that formerly applied to all public school employee pensions. And under PA 300, MPSERS members must pay an increased healthcare premium equivalent to 3 percent of their compensation or instead elect to join a "Tier 2" defined contribution benefit plan.

I concur with the majority's resolution of plaintiffs' healthcare benefit claim. As the majority explains, the Supreme Court concluded in *Studier v. Michigan Pub Sch Employees' Retirement Bd,* 472 Mich. 642; 698 NW2d 350 (2005), that public school employees have no constitutional entitlement to healthcare benefits. The *Studier* Court held, "the Legislature intended for payment of health care benefits by the MPSERS under MCL 38.1391(1) to simply be a 'fringe benefit' to which public school employees would never have a contractual entitlement." *Id.* at 667–668. Healthcare benefits do not even qualify as "financial" benefits protected under Const 1963, art 9 § 24, the *Studier* Court further held, because they are not in the form of "monetary payments." *Id.* at 655. As Justice Cavanagh articulated in dissent, the *Studier* majority found it constitutionally acceptable for our State to promise healthcare benefits to its teachers, and to break this promise at will. *Id.* at 679 (CAVANAGH, J., dissenting).

Nevertheless, in *AFT Michigan v. Michigan,* 297 Mich.App 597, 604; 825 NW2d 595 (2012), this Court struck down on constitutional grounds a statutory modification of plaintiffs' healthcare benefit formula. The 2010 act required "that public school districts ... withhold three percent of each employee's wages and remit the amount to the MPSERS as 'employer contributions' to the trust that funds retiree health care benefits." *Id.* The *AFT Michigan* Court held that the law impaired contractual rights and allowed the government to take private property without compensation. *Id.*

The Legislature made virtually no change to the language struck down in *AFT Michigan,* but added a provision— § 91a(5)—permitting members to avoid the three-percent wage withholding by joining a "Tier 2" plan. The majority reasons that "the voluntary nature of 2012 PA 300" allowing public school employees to "opt in or opt out of the legislative scheme" cured the constitutional infirmities discerned by the *AFT Michigan* Court. Plaintiffs fail to persuasively counter this logic. Plaintiff Michigan Education Association (MEA) argues that the act "impose[s] a significant contribution requirement on all MPSERS members, including those who have been members of the retirement system for many years and whose rights to retiree health premium payments have vested." The MEA concedes, however, that *Studier* negates this argument.

On the other hand, I agree with plaintiffs that *pension* benefits are clothed with constitutional protection from impairment or diminishment. Const 1963, art 9, § 24 serves "to ensure that public pensions be treated as contractual obligations that, once earned, could not be diminished." *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38,* 490 Mich. 295, 311; 806 NW2d 683 (2011). See also *Kosa v. Treasurer of State of Mich,* 408 Mich. 356, 360; 292 NW2d 452 (1980) ("To gain protection of their pension rights, Michigan teachers effectively lobbied for a constitutional amendment granting contractual status to retirement benefits."). As the Supreme Court explained in *Advisory Opinion re Constitutionality of 1972 PA 258,* 389 Mich. 659, 662–663; 209 NW2d 200 (1973), "it was the intention of the framers of the constitution" to make the accrued financial benefits of public pensions "contractual rights."

Plaintiffs contend that the enforceable contract includes the 1.5–percent multiplier formula in effect by statute since 1945. However, no evidence supports that 2012 PA 300 impairs or reduces the benefits earned pursuant to the 1.5–percent multiplier that accrued before 2012 PA 300 took effect. Further, in *Advisory Opinion re Constitutionality of 1972 PA 258,* 389 Mich. at 663 (emphasis added), the Supreme Court observed that under Const 1963, art 9, § 24, "the Legislature cannot diminish or impair accrued financial benefits, *but we think it may properly attach new conditions for earning financial benefits which have not yet accrued* ." Plaintiffs have

failed to distinguish this language from the case at bar. Although plaintiffs have pointed to caselaw from other jurisdictions that reached a result contrary to the majority opinion, in most of those cases the courts found that statutory language created binding contracts. To date, our Supreme Court has not found any binding contractual obligations residing within legislative enactments. To the contrary, in *Studier,* 472 Mich. at 661, the Supreme Court emphasized "the strong presumption that statutes do not create contractual rights."

Finally, plaintiffs contend that 2012 PA 300 violates the second sentence of art 9, § 24, which states: "Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities." MEA's brief contends that the act "uses current service contributions levied against the members to finance the unfunded accrued liabilities of MPSERS, *i.e.,* the $15.6 billion of the State's unfunded accrued liability that accrued to MPSERS members in the past."[1] According to plaintiffs, 2012 PA 300 "is an attempt to make the members of MPSERS pay for a large portion of the pension benefits which had already accrued to them prior to" the act's passage.

The record neither supports nor refutes that at the time 2012 PA 300 was enacted, the MPSERS balance sheet included "unfunded accrued liabilities" that will be paid through a mechanism created by the act. Nor does the record demonstrate whether the Legislature, or MPSERS, has applied current member contributions against unfunded accrued liabilities. If 2012 PA 300 has resulted in the collection of money used to meet pre–2012 unfunded accrued liabilities through a "borrowing scheme" similar to that condemned in *Kosa,* 408 Mich. 356, I would agree that *as applied,* the act raises constitutional concerns. In my view, this issue should be addressed with the benefit of a full evidentiary record in a different case. Because the evidence necessary to evaluate this issue is not before this Court, I concur with the majority that based on the challenges raised here, 2012 PA 300 passes constitutional muster.

Footnotes

1 Referred to collectively as "plaintiffs."

2 Although not an issue on appeal, the Court of Claims struck as unreasonable a 52–day election period under MCL 38.1359, finding that such a short time deprived members of the opportunity to make a reasonably informed decision.

3 The appeals have been consolidated for appellate review. *AFT Michigan v. State of Michigan,* unpublished order of the Court of Appeals, entered January 9, 2013 (Docket Nos. 313960 and 314065).

4 "It is important to emphasize the fact that an advisory opinion does not constitute a decision of the Court and is not precedentially binding in the same sense as a decision of the Court after a hearing on the merits." *In re Constitutionality of Act No 294 of Public Acts of 1972,* 389 Mich. 441, 461; 208 NW2d 469 (1973).

1 Earlier in the same brief, the MEA proclaims: "There is no financial crisis regarding MPSERS. It is and has been paying for all pension benefits that come due. The Michigan Legislature has never declared that there was a financial crisis regarding MPSERS. MPSERS has sufficient money to meet its financial commitments to its retirees."

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6.111 Retirement System

The Wayne County Employees Retirement System created by ordinance is continued for the purpose of providing retirement income to eligible employees and survivor benefits. The County Commission may amend the ordinance, but an amendment shall not impair the accrued rights or benefits of any employee, retired employee, or survivor beneficiary.

COMPILER'S COMMENTS:

The Wayne County Retirement Ordinance was republished on November 20, 1986 (Ordinance 86-486) to incorporate all prior amendments, conform the ordinance with federal law, remove outdated provisions, and reconcile inconsistent terminology. This was done again on November 17, 1994 in Ordinance 94-747, which has since been amended by Ordinances 97-728, 98-335, 2000-536, 2002-1103, 2002-1147, 2003-124 and 2005-924. (Code Chapter 141)

It has been ruled that those provisions of the Wayne County Retirement Ordinance which provided for "20 and out" benefits for non-union employees were invalid because in conflict with MCL 46.12a which requires that a county employee have at least 25 years of service to become eligible for retirement benefits if less than 60 years of age. (Donald Gray vs. Wayne County Retirement System, et al Civil Action No. 84-401 649 CK, August 31, 1984, Third Circuit Judge Roland Olzark presiding.)

6.112 Retirement Commission

The Retirement Commission is composed of 8 members: The CEO or the designee of the CEO, the chairperson of the County Commission, and 6 elected members. The members must be residents of Wayne County. Four members shall be active employees elected by active employees of the County in the manner provided by ordinance and 2 members shall be retired employees elected by retired employees of the County in the manner provided by ordinance. The term of the elected members is 4 years. The Retirement Commission shall administer and manage the Retirement System . The costs of administration and management of the Retirement System shall be paid from the investment earnings of the Retirement System.

COMPILER'S COMMENTS:

In opinion 88-012, the Corporation Counsel advised that the Retirement Commission was without authority to amend the Retirement Ordinance or to expand benefits beyond those authorized by the Ordinance.

6.113 Financial Management

The financial objective of the Retirement System is to establish and receive contributions each fiscal year which, as a percentage of active member payroll, are designed to remain approximately level from year to year. Specifically, contributions shall be sufficient to (i) cover fully costs allocated to the current year by the actuarial funding method, and (ii) liquidate over a period of years the unfunded costs allocated to prior years by the actuarial funding method. The period of years used in the application of item (ii) shall not exceed 35 years for unfunded amounts in existence December 1, 1982, 25 years for unfunded amounts resulting from benefit changes effective on or after December 1, 1982, and 15 years for experience gains and losses during years ending after November 30, 1981. Contributions made after November 30, 1981, which are in excess of the minimum requirement, may be used to reduce contribution requirements in a subsequent fiscal year. The actuarial funding method must produce contribution requirements which are not less than those produced by the individual-entry-age-normal-cost-actuarial method.

6.114 Employment of Actuary

The actuary employed by the Retirement System must have 5 years experience as a practicing actuary.

ARTICLE VII SPECIFIC POWERS & PROVISIONS

7.111 Inter-Governmental Contracts

S

or if a refund beneficiary is not on file with the retirement system, the member account shall be paid to the individual's estate.

(Ord. No. 94-141, §§ 28.01—28.03, eff. 12-2-94)

Sec. 141-35. Retirement commission.

(a) *Composition.*

(1) The retirement commission shall consist of the following eight individual trustees:

a. The chairperson of the county commission.

b. The county executive or the individual designated by the executive to serve in the executive's place. The designation shall be in writing and filed with the retirement commission.

c. Four members of the retirement system, who are residents of the county, to be elected by the members of the retirement system. Each member trustee shall be from a different county department, as provided in the county Charter on January 1, 1987, that is: the county commission; prosecuting attorney; sheriff; county clerk; county treasurer; register of deeds; corporation counsel; personnel; management and budget; health; public works; office of public services; and senior citizens. Employees of all other county agencies shall be considered collectively to be employees of one additional county department for the purposes of this provision. This restriction upon eligibility to serve as a trustee shall not be affected by changes made in the organization and administration of executive departments by an executive reorganization plan. The elections shall be conducted in accordance with procedures adopted by the retirement commission.

d. Two retired members, who are residents of the county, to be elected by the retired members and beneficiaries. The elections shall be conducted in accordance with procedures adopted by the retirement commission.

(2) Retirement commission trustees shall serve without compensation for their service as a retirement commissioner but shall be reimbursed by the retirement system for their actual and necessary expenses incurred in the performance of the duties of retirement commissioner. Absence from work on account of retirement commission duties is authorized and shall be treated so that the individual suffers no loss of pay or benefits.

(b) *Term of office; oath of office; vacancies.*

(1) The term of office of the elected member trustees shall be four years, one such term of office to expire at the end of each calendar year. The term office of the elected retired member trustees shall be four years, one such term to expire at the end of each even-numbered calendar year.

(2) Each trustee shall, prior to taking office, take an oath of office administered by the county clerk.

(3) A vacancy shall occur on the retirement commission if a member elected trustee ceases to be a member or becomes employed in a county department in which is employed another member elected trustee or ceases to be a county resident or resigns.

(4) A vacancy shall occur on the retirement commission if a retired member trustee ceases to be a retired member or ceases to be a county resident or resigns.

(5) A vacancy shall be filled within 90 days, for the unexpired term, in the same manner as the position was previously filled.

(c) *Meetings.* The retirement commission shall schedule sufficient meetings to effectively carry out its duties and shall designate the time and place of each meeting. The retirement commission shall adopt rules of procedure. The retirement commission shall select from its membership a chairperson and a vice-chairperson.

(d) *Quorum; record of proceedings.* Four trustees shall constitute a quorum at any meeting of the retirement commission. At least four concurring votes shall be required for a valid action by the retirement commission. The retirement commission shall keep a written record of its proceedings.

(e) *Executive secretary.* The retirement commission shall appoint an executive secretary. The executive secretary shall be the secretary of the retirement commission and shall be the administrative officer of the retirement commission. The duties of the executive secretary shall be established by the retirement commission.

(f) *Employees of retirement commission; employment of outside services.*

(1) The retirement commission may employ persons in the county classified service.

(2) The corporation counsel shall be the legal advisor to the retirement commission.

(3) The retirement commission shall designate an actuary who shall advise the board on the actuarial operation of the retirement system and on such other subjects as the retirement system may determine. "Actuary" shall mean a member of the American Academy of Actuaries or an individual who has demonstrated the educational background necessary to effectively render actuarial advice to the retirement system and who has at least five years of relevant public employee retirement system actuarial experience. A partnership or corporation may be designated as actuary if the duties of actuary are performed by or under the direct supervision of an individual who meets the preceding requirements.

(4) The retirement commission shall employ a medical director who is licensed by the State of Michigan to engage in the practice of medicine.

(5) The retirement commission is authorized and empowered to employ such other persons and services as it requires to effectively carry out its duties.

(g) *Reports.*

(1) The retirement commission shall prepare an annual report for each fiscal year. The annual report shall contain information about the financial, actuarial and other activities of the retirement system during the fiscal year. A copy of the annual report shall be furnished the county commission within 300 days of the end of the fiscal year.

(2) A summary of the annual report shall be made available to the members, vested former members, retired members and beneficiaries of the retirement system.

(h) *Investment authority.* The retirement commission is the trustee of the assets of the retirement system. The retirement commission has the authority to invest and reinvest the assets of the retirement system subject to all terms, conditions, limitations and restrictions imposed by the state on the investments of public employee retirement systems. The retirement commission may employ investment counsel to advise the board in the making and disposition of investments. In exercising its discretionary authority with respect to the management of the assets of the retirement system, the retirement commission shall exercise the care, skill, prudence, and diligence, under the circumstances then prevailing, that an individual of prudence acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and similar objectives.

(i) *Use of retirement system assets; prohibited actions.*

(1) The assets of the retirement system shall be held and invested for the sole purpose of meeting the obligations of the retirement system and shall be used for no other purpose.

(2)

Members of the retirement commission and its employees are prohibited from:

a. Having a beneficial interest, direct or indirect, in an investment of the retirement system.

b. Borrowing from the retirement system.

c. Receiving any pay or emolument from any individual or organization, other than compensation for personal services or reimbursement of authorized expenses paid by the retirement system, providing services to the retirement system.

(3) No payment shall be made unless it has been authorized in advance by a specific or continuing resolution of the retirement commission. Authorized payments shall be made by county voucher signed by two persons designated by the retirement commission. An attested copy of the resolution designating the persons and specimen signatures shall be filed with the county treasurer.

(Ord. No. 94-747, §§ 29.01—29.03, eff. 12-2-94)

Sec. 141-36. Financial objective; contribution certification.

(a) *Financial objective.*

(1) The financial objective of the retirement system is to receive contributions each fiscal year which, as a percentage of member payroll, are designed to remain level from year to year and are sufficient to (i) fund the actuarial cost allocated to the current year by the actuarial cost method, and (ii) fund unfunded actuarial costs to prior years by the actuarial cost method as follows:

a. Over not more than 35 years for amounts existing December 1, 1982.

b. Over not more than 25 years for amounts arising from benefit changes effective after November 30, 1982.

c. Over not more than 15 years for amounts arising from experience losses or gains during retirement system fiscal years ending after November 30, 1981.

(2) Contribution requirements for defined benefits shall be determined by annual actuarial valuation; provided that the contribution requirement may be reduced or eliminated for a fiscal year pursuant to the procedures in section 141-32. The actuarial cost method shall be one which produces a contribution requirement not less than the contribution requirement produced by the individual entry-age normal cost method.

(3) The excess of actual contributions made for periods after November 30, 1981, over the minimum required by subsections (a)(1) and (2) of this section may be used to reduce contributions required for subsequent fiscal years.

(4) Contribution requirements of the county for defined contribution benefits shall be in accordance with the county contribution program specified for a member's coverage group. The contribution requirement may be actuarially discounted for anticipated forfeitures.

(b) *Certification of contribution requirement.* The retirement commission shall certify to the county executive the amount of annual contribution needed to meet the financial objective.

(Ord. No. 94-747, §§ 30.01, 30.02, eff. 12-2-94; Ord. No. 2006-824, § 1, 10-6-06; Ord. No. 2010-514, 9-30-10)

Sec. 141-37. Reserve accounting.

(a) *Reserve for accumulated member contributions.*

(1) The reserve for accumulated member contributions is the account in which is accumulated